

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NEWCOR BAY CITY DIVISION OF
NEWCOR, INC.

and

Case 7-CA-47590

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), AFL-CIO, AND ITS
LOCAL 496

Scott R. Preston, Esq., for the General
Counsel.
Gary W. Klotz, Esq., and *Craig M.*
Stanley, Esq. (Butzel Long, PC),
Detroit, Michigan, for the Respondent.
Carlos F. Bermudez, Esq., UAW
International Union, Detroit, Michigan,
for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This is a supplemental proceeding to determine the amount of backpay and other benefits owed certain discriminatees under the terms of the National Labor Relations Board's (the Board) November 8, 2005 order which was enforced by the United States Court of Appeals for the Sixth Circuit on February 15, 2007.

The hearing in this matter was held on February 23-25, 2010, in Saginaw, Michigan. The parties filed briefs which have been carefully considered. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following.

Findings of Fact

I. Background to the Supplemental Proceedings

A. The Litigation Backdrop

The underlying decision of Administrative Law Judge Paul Bogas, as affirmed by the Board

This instant matter began with Judge Bogas' decision dated April 26, 2005, in which he concluded, inter alia, as a matter of law that the Respondent violated Section 8(a)(5) and (1) of

the Act by unilaterally implementing the terms set forth in its final contract proposal effective June 11, 2004, without bargaining in good faith to a valid impasse.

The judge recommended that this violation in pertinent part be remedied by the Respondent's taking the following affirmative action.

(a) Restore, honor, and continue the terms and conditions of the contract with the Union that was set to expire on June 10, 2004, until the parties sign a new agreement or good-faith bargaining lead to a valid impasse, or the Union agrees to changes.

(b) Make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of the Respondent's unlawful alteration or discontinuance of contractual benefits, with interest, as provided for in the remedy section of this decision.

(c) Make contributions, including any additional amounts due, to any funds established by the collective-bargaining agreement with the Union that was in existence on June 10, 2004, and which the Respondent would have paid but for the unlawful unilateral changes as provided for in the remedy section of this decision.

On November 8, 2005, the Board affirmed Judge Bogas' decision but amended his remedy as follows:

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, and to immediately put into effect all terms and conditions of employment provided by the contract that expired at midnight on June 10, 2004, and to maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes. We shall order the Respondent to make whole the unit employees and former unit employees for any loss of wages or other benefits they suffered as a result of the Respondent's implementation of its final proposal on June 11, 2004, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d (6th Cir. 1971), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall order the Respondent to reimburse unit employees for any expenses resulting from the Respondent's unlawful changes to their health and dental benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons for the Retarded*, supra. We shall further order that the Respondent make all contributions to any fund established by the collective-bargaining agreement with the Union which was in existence on June 10, 2004, and which contributions the Respondent would have paid but for the unlawful unilateral changes, including any additional amounts due to the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 6 (1979).¹

On February 15, 2007, the United States Court of Appeals for the Sixth Circuit determined that the Board's conclusions were supported by substantial evidence and granted

¹ 345 NLRB 1229 (2005). In a footnote, the three-member panel stated that "We have modified the judge's remedy to include appropriate remedial provisions for any [emphasis supplied] loss of wages and benefits suffered by employees." Fn. 2 at 1229.

enforcement of its order, noting the Board's affirmation of the Judge Bogas' ruling, findings, and conclusions and adopting (in the main) the recommended Order.²

B. The General Counsel's Compliance Specification

On September 27, 2007, the Regional Director for Region 7 issued the first of several compliance specifications in this case and set the matter down for hearing. On November 1, 2007, March 10, May 22, and December 1, 2008, the Regional Director issued his second, third, and fourth amended compliance specifications along with corresponding hearing dates. The Respondent filed timely its answers to these compliance specifications, agreeing in part and denying in part the specifications in question, and also asserting certain affirmative defenses.

On November 17, 2009, the Regional Director issued his fifth amended compliance specification in this cause and again rescheduled the matter for hearing. The Respondent on December 30, 2009, timely filed its answer to this specification and an amended answer, again admitting parts but also denying parts of the specification, and also asserting certain affirmative defenses.

The instant litigation concerns the fifth amended specification.³

C. The General Counsel's Backpay Specification as Applied to Identified Discriminatees

As noted, on November 17, 2009, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a compliance specification, entitled Fifth Amended Compliance Specification (and notice of hearing), which alleges the Respondent's liability for backpay and other benefits owed to certain named discriminatees under the terms of the Board's Order as enforced by the Sixth Circuit.

On December 30, 2009, the Respondent filed its answer to the aforementioned compliance specification admitting to certain aspects thereof, denying in others, and asserting certain affirmative defenses. On February 20, 2010, the Respondent filed an amended answer to this specification, again admitting to certain aspects of the specification, denying others, and asserting certain affirmative defenses.

The compliance specification (the specification) identified the following persons as discriminatees entitled to an award for loss of pay and other benefits as a result of the Respondent's unlawful action.

- | | | |
|--------------------|-----------------------|-----------------------|
| 1. James R. Aumend | 10. Scott B. Dennis | 19. Terrance Hartley |
| 2. Robert Jackson | 11. Joseph Kanicki | 20. Gary Letzgus |
| 3. Robert Maida | 12. John C. Martin | 21. Thomas Martindale |
| 4. Craig M. Page | 13. Kenneth Reinhardt | 22. Rodney Ruse |
| 5. Jeffrey Ryan | 14. George Sawade | 23. Terry L. Schmidt |

² *NLRB v. Newcor Bay City Division of Newcor, Inc.*, No. 06-11285 (2007).

³ The fifth amended specification was also amended in part at the hearing over no objection by the Respondent. In this regard, see GC Exh. 2, the amended specification for Thomas R. Schmidt; GC Exh. 3, the amended specification for Richard Pomaville; GC Exh. 4, the amended specification for Robert W. Bean; GC Exh. 5, the amended specification for James F. Moore; and GC Exh. 6, the amended Table I.

6. Joseph Schwartz
7. Todd Stodolak
8. Robert W. Bean
9. Richard Pomaville

15. Thomas Seidel
16. Rodney Thompson
17. James E. Gasta
18. Ronald Rinz

24. Dale Sigmund
25. John A. Van Hurk
26. Thomas West
27. James F. Moore
28. Thomas R. Schmidt

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While the Respondent disputes the amounts, if any, owed to some of the persons identified as discriminatees, it does not deny that these persons were all employed by it at some time during the period covered by the Board's Decision and Order. For purposes of resolving the controversy regarding the Respondent's liability, I will consider all of the persons listed above as the finite class of persons entitled (or not) to awards for loss of pay and for other benefits because of the Respondent's violation of the Act. I will henceforth deal with each discriminatee separately to make my determinations.

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II. The Backpay Specification Applied by Discriminatee

As a preliminary matter regarding the specification's component allegations, the Respondent admitted in its answer that the gross backpay due unit and former unit employees was the amount of earnings each would have obtained but for the unilateral changes the Company implemented. The Respondent also admitted that it made payments in August 2007 to certain of the discriminatees for paid personal holidays and paid vacation owed in partial satisfaction of its obligation under the Board's Order.⁴ The Respondent further admitted that the backpay period as set out in the specification for discriminatees who continued their employment with Newcor Bay City after June 10, 2009, is June 11, 2004, to March 1, 2007. Furthermore, the Respondent admits that an appropriate measure of backpay for the employees who continued their employment with Newcor Bay City after June 10, 2004, is the hours for which they were paid, including overtime hours during the backpay period, multiplied by the wage difference between what they actually were paid per hour and the wages set forth in the collective-bargaining agreement (CBA) that expired at midnight June 10, 2004—also called the "wage differential."

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The Respondent admits that the following discriminatees comprise the class of employees who continued their employment with Newcor Bay City after June 10, 2004, and are entitled to appropriate individual backpay awards based on the aforesaid measure of backpay for the time each continued working for the Company.

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James R. Aumend
Robert Jackson
Robert Maida
Craig M. Page
Jeffrey Ryan
Joseph Schwartz
Todd Stodolak ⁵

Scott B. Dennis
Joseph Kanicki
John C. Martin
Kenneth Reinhardt
George Sawade
Thomas Seidel
Rodney Thompson

Terrance Hartley
Gary Letzgus
Thomas Martindale
Rodney Ruse
Terry L. Schmidt
Dale Sigmund
John A. Van Hurk⁶

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⁴ The discriminatees in questions were Robert Jackson, Gary Letzgus, Craig Page, Rodney Ruse, Rodney Thompson, and John Van Hurk.

⁵ The Respondent initially in its answer denied discriminatee Stodolak's entitlement to a backpay award. At the hearing, Stodolak's claim was mutually agreed to by the parties.

⁶ Each of these employees will be discussed separately later in this decision. It should be noted that for these discriminatees the General Counsel's computations are included in Table A of the Fifth Amended Compliance Specification. (GC Exh. 1(pp)). I have reviewed the

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In addition, the Respondent has admitted to the validity and accuracy of the specification as applied to amounts owed but not specifically to the individual employees. This will be discussed later herein.

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III. The Uncontested Backpay Awards

In its answer to the specification, the Respondent admitted that certain discriminatees were entitled to the backpay amounts stipulated by the specification calculations appertaining to the individual discriminatee. Consistent with its admissions, the Respondent did not contest the backpay specification and the associated amounts at the hearing. Accordingly, I find and conclude that the backpay awards for the following named discriminatees are based on a fair, rational and reasonable scheme that fairly meets the Board's make-whole remedy for these persons.⁷

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James R. Aumend: Aumend worked for the Respondent from June 11, 2004, though August 11, 2006, when he retired. Based on the specification as applied to his situation, Aumend is entitled to backpay, vacation pay, holiday pay, and personal paid holiday (pph) pay in the total amount of \$8153.45.⁸

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Robert Jackson: Jackson's backpay period covers the period June 11, 2004, through February 28, 2007, when the Respondent reinstated the correct (pre-June 11 contract) wage rate. Based on the specification as applied to his situation, Jackson is entitled to backpay, vacation pay, holiday pay, and pph pay and reimbursement for out-of-pocket medical expenses in the total amount of \$8281.25.⁹

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Robert Maida: Maida worked for the Respondent during the period covering June 11 through 28, 2004, when he was laid off. Maida is entitled by application of the specification to his situation to backpay, vacation pay, holiday pay; and reimbursement for out-of-pocket dental expenses ordinarily covered by insurance; and COBRA (medical insurance) payments in the total amount of \$3074.45.

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Craig M. Page: Page's backpay period covers June 11, 2004, through February 28, 2007, when the Respondent reinstated the correct wage for him. Based on the specification as applied to him, he is entitled to backpay, vacation pay, holiday pay, pph pay, bridge (retirement) money, and reimbursement for out-of-pocket medical expense in the total amount of \$16,214.57.¹⁰

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computations and they appear to be accurate and correct. However, if any mathematical errors are discovered later, I would recommend that any such errors be self-correcting without further order from me.

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⁷ None of the following named discriminatees appeared at the hearing. Notably, these persons were of the class of employees who continued working at the Respondent after June 10, 2004.

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⁸ By way of reminder, the amount determined is supported by Table A, p. 1 of the specification. This table applies to all of the uncontested awardees.

⁹ Jackson was paid an unstated amount for pph in August 2007 by the Respondent by way of a partial satisfaction of the Company's obligation under the Board's Order. Similarly, the Respondent also claimed to have paid him for his vacation in its answer.

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¹⁰ According to the specification, Page was paid an unstated amount for pph in August 2007 in partial satisfaction of the Respondent's obligation under the Board's Order. The Respondent

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Jeffrey Ryan: Ryan's backpay period covers June 11, 2004, August 4, 2006, when he resigned. Based on the specification as applied to him, Ryan is owed backpay, vacation pay, holiday pay, pph pay, and reimbursement for out-of-pocket medical expenses covered by insurance in effect prior to June 11, 2004, in the total amount of \$11, 641.11.

Joseph Schwartz: Schwartz' backpay period covers June 11 through 28, 2004, when he was laid off. Based on the specification as applied to him, Schwartz is entitled to backpay, vacation pay, holiday pay, and pph pay in the total amount of \$1363.68.

Scott B. Dennis: Dennis' backpay period covers June 11, 2004, through January 31, 2005, when he was laid off. Based on these specifications as applied to him, Dennis is entitled to backpay, vacation pay, holiday pay, pph pay, and reimbursement for out-of-pocket medical expenses that would have been covered by medical insurance in effect prior to June 11, 2004, in the total amount of \$7725.51.

Joseph Kanicki: Kanicki's backpay period covers June 11 through 28, 2004, when he was laid off. Based on the specification as applied to him, Kanicki is entitled to backpay, vacation pay, and holiday pay in the total amount of \$2427.96.

John C. Martin: Martin's backpay period covers June 11 though 28, 2004, when he was laid off. Based on the specification as applied to him, Martin is entitled to backpay, vacation pay, holiday, pph pay, and reimbursement for out-of-pocket medical expenses that would have been covered by medical insurance in effect prior to June 11, 2004, in the total amount of \$1211.96.

Kenneth Reinhardt: Reinhardt's backpay period covers June 11 through 28, 2004, when he was laid off. Based on the specification as applied to him, Reinhardt is entitled to backpay and holiday pay in the total amount of \$258.88.

George Sawade: Sawade's backpay period covers the period June 11, 2004, through the first week of February 2005,¹¹ when he retired. Based on the stipulation as applied to him, Sawade is entitled to backpay, holiday pay, and pph pay in the total amount of \$3794.11.

Thomas Seidel: Seidel's backpay period covers the period June 11 through 28, 2004, when he was laid off. Based on the specification as applied to him, Seidel is entitled to backpay, vacation pay, holiday pay, and pph pay in the total amount of \$3988.71.

Rodney Thompson: Thompson's backpay period covers the third and fifth quarters of calendar 2006.¹² Based on the specification as applied to him, Thompson is entitled to backpay and vacation pay in the total amount of \$2977.49.

in its answer avers that it paid him similarly for vacation. It should be noted that the Respondent disputes Page's entitlement to the bridge money component of this amount, which is reckoned to be about \$3000.

¹¹ The specification does not state a specific retirement date in February 2005 for Sawade.

¹² The specification does not state a more definite time frame for Thompson. I assume that third quarter 2006 means the time frame covering July through September. I have to assume that the inclusion of a "fifth" quarter is a clerical mistake and probably means the fourth quarter of 2006—October through December. In any case, the Respondent registered no objection to the specification's wording in par. 24(a) of the specification, choosing to "admit" its correctness

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Terrance Hartley: Hartley's backpay period covers the period June 11 through 28, 2004, when he retired. Based on the specification as applied to him, Hartley is entitled to backpay, vacation pay, and holiday pay in the total amount of \$4157.52.

Gary Letzgus: Letzgus' backpay period covers June 11, 2004, through February 28, 2007, when the Respondent reinstated the correct wage rate. Based on the specification as applied to him, Letzgus is entitled to backpay, vacation pay, holiday pay, pph pay, and reimbursement for out-of-pocket medical expenses that would have been covered by medical insurance in effect prior to June 11, 2004, in the total amount of \$27,576.08.¹³

Thomas Martindale: Martindale's backpay period covers the period June 11, 2004, through June 30, 2005, when he retired. Based on the specification as applied to him, Martindale is entitled to backpay, vacation pay, holiday pay, pph pay, and reimbursement for out-of-pocket medical expenses that would have been covered by medical insurance in effect prior to June 11, 2004, in the total amount of \$5089.65.

Rodney Ruse: Ruse's backpay period covers the period June 11, 2004, through February 28, 2007, when the Respondent reinstated the correct wage rate. Based on the specification as applied to him, Ruse is entitled to backpay, vacation pay, holiday pay, pph, and reimbursement for out-of-pocket medical expenses that would have been covered by the medical insurance in effect prior to June 11, 2004, in the total amount of \$13,470.72.¹⁴

Terry L. Schmidt: Schmidt's backpay period covers only 1 day, June 11, 2004, when he was laid off. Based on the specification, Schmidt is entitled to backpay and 238 hours of vacation pay in the total amount of \$4592.76.

Dale Sigmund: Sigmund's backpay period covers the period June 11 through September 1, 2004, when he was laid off. Based on the specification as applied to him, Sigmund is entitled to backpay, vacation pay, holiday pay, pph pay, and reimbursement for out-of-pocket expenses in the total amount of \$5592.67.

John A. Van Hurk: Van Hurk's backpay period covers the period June 11, 2004, through February 28, 2007, when the Respondent reinstated the correct wage rate, vacation pay, holiday pay, pph pay, and reimbursement for out-of-pocket expenses in the total amount of \$14,133.73.¹⁵

Todd Stodolak: As noted earlier in its answer, the Respondent initially denied the specification allegations (in par. 23(a)–(d)) regarding Stodolak's backpay entitlements.

in principle at least. Moreover, based on the pleadings, the Respondent admits that it paid (amount not stated) Thompson for pph in August 2007 pursuant to the Board's Order.

¹³ According to the specification, Letzgus was paid an unstated amount for pph in partial satisfaction of the Board's Order in August 2007. The Respondent in its answer avers that it also paid similarly a payment for Letzgus' vacation pay entitlement.

¹⁴ According to the specification, Ruse was paid an unstated amount for pph in partial satisfaction of the Respondent's obligation under the Board's Order in August 2007. The Respondent avers that it paid him similarly for his vacation pay entitlement.

¹⁵ According to the specification, Van Hurk was paid an unstated amount for his pph entitlement in partial satisfaction of the Board's Order in August 2007. The Respondent avers that it also similarly paid him for his vacation entitlement.

However, the Respondent in its amended answer admitted that the specification as applied to Stodolak was accurate and no longer disputed by the Company. The Respondent through counsel confirmed this position at the hearing. Accordingly, the backpay period for Stodolak is the period covering June 11, 2004, through August 9, 2006, when he resigned. Based on the specification as applied to him, Stodolak is entitled to backpay, vacation pay, holiday pay, pph pay, and reimbursement for out-of-pocket medical expenses which would have been covered by medical insurance in effect prior to June 11, 2004, in the total amount of \$4808.56.

Thomas West: The specification (in pars. 26(a)–(j)) stated that West is owed for the backpay period applicable to him—June 11, 2004, through February 2008 when the Newcor Bay City plant closed—a total of \$112,596.42 that included backpay, vacation pay, holiday pay, pph pay, a pension increase (enhancements) for March 1, 2008, through September 30, 2009, out-of-pocket medical expenses that would have been covered by medical insurance in effect prior to June 11, 2004, and bridge money.¹⁶

The Respondent in its answer admitted certain aspects of the specification, denied others, and neither admitted nor denied other aspects claiming a lack of information to form a conclusion one way or the other.

At the hearing, the parties reached a stipulation and agreement regarding a partial settlement of West's backpay entitlement as follows:

MR. PRESTON: First off, I'd like to, pursuant to an agreement between all parties, I'd like to amend paragraph 26(j) to amend Thomas West's total net back pay at \$96,000, not including interest, which is still due, and not including the bridge money. And that \$96,000, once again, is subject to interest, so our total backpay for Mr. West that we actually are alleging will be \$99,375 when you include the bridge money, which we will be litigating here today.

JUDGE SHAMWELL: And this has been broached to Mr. Klotz or Mr. Stanley –

MR. PRESTON: Actually, we agreed upon that. If you look at their amended answer, it actually already admits to the \$96,000, not including interest or bridge money.¹⁷

The specification states that when the Respondent unlawfully imposed its last offer, the provisions of Article 10, Section 10.2(A) (Vacation Pay) of the collective-bargaining agreement were eliminated. As a result, certain employees then on layoff status are due accrued vacation pay.¹⁸ They are listed as follows with the associated vacation pay entitlement:

¹⁶ The specification states that West was voluntarily retired on June 10, 2004, as a service and test employee prior to the Respondent's unlawful implementation of the June 10, 2006 offer and was an employee comparable to the above-mentioned employee Gary Letzgus until December 31, 2007, and above-mentioned employees Craig Page and John Van Hurk from January 1, 2008, until the plant closed in February 2008.

¹⁷ Tr. 18–19. The Respondent through counsel agreed to the \$96,000 figure at Tr. 20. The remaining \$3375 in claimed entitlement for West will be discussed later in this decision in the context of the contested awardees.

¹⁸ The specification stated that the contract in part provides that if an employee is prevented from taking vacation due to layoff, he/she will be paid for all remaining hours. In a footnote, the specification states that the amount due each listed employee is based on the number of hours of vacation accrued based on seniority multiplied by their previous June 10, 2004 hourly rate, less any amounts the Respondent paid them.

	John Dahn, Jr.	\$5787.60
	Scott Dewyse	991.20
	Randall Rezler	3113.64
5	Douglas Dewyse	2699.62
	Robert Liss	1520.76
	Michael Ziolkowski	2178.00

10 The Respondent in its answer admits that these aforestated amounts are due and payable to these employees exclusive of interest.

Miscellaneous Uncontested Entitlements

15 The specification states essentially that because of the Respondent's unlawful implementation of its final offer on June 11, 2004, the Company deleted the CBA's requirement (in Art. 4 Sec 4.3, subsec. J (the Sub Fund)) of contributing to and maintaining a balance of \$20,000 in the Sub Fund and maintaining that balance during each subsequent year.

20 The Respondent admits that since June 11, 2004, it has failed to reimburse the Sub Fund so as to maintain a balance of \$20,000 to a maximum of \$60,000 for contributions not made through February 29, 2008.¹⁹

IV. The Contested Awardees

25 The specification states that certain employees retired from the Respondent effective June 10, 2004, in order to preserve certain benefits that would not have been available to them had they chosen to retire on or after June 11, 2004, the date of the Respondent's unlawful implementation of its last offer. The specification goes on to state had the Respondent not unlawfully implemented its June 10, 2004 final offer, the employees in question would have
30 continued to work in their respective job classifications based on their seniority relative to comparable employees who continued to work.

35 According to the specification, the backpay period for each of these employees began on June 11, 2004, and ended when the employment of a comparable employee ended. The employees in this class of claimed awardees, along with the employee deemed comparable in parentheses, are as follows:

1. Thomas Schmidt (Gary Letzgus)
2. Richard Pomaville (Craig M. Page)
- 40 3. Robert Bean (George Sawade)
4. James F. Moore (James R. Aumend)
5. Ronald Rinz (Rodney Thompson)
6. James Gasta (Rodney Ruse)²⁰

45 ¹⁹ It its amended answer, the Respondent admitted the validity and accuracy of the specification, and at the hearing the Respondent's counsel stipulated and agreed with the General Counsel that this aspect of the specification was valid and accurate. The parties' stipulated agreement regarding the Sub Fund contributions is \$54,000. (See Tr. 22.)

50 ²⁰ The specification states that Gasta, employed in the Newcor Bay City electrical department, had the most seniority there and he would have continued to work there. Accordingly, an appropriate comparable employee for purposes of determining Gasta's gross
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This specification further states that under the CBA (contract) that expired on June 10, 2004, employees who retired after May 31, 1995, were entitled to a pension benefit supplement of \$375 per month for up to 4 years or until the retiree reached age 65.

Employees Thomas West and Craig Page retired effective January 1 and February 1, 2009, respectively. The specification states essentially that both employees were denied their respective pension supplement, known as "bridge money," retroactive to their retirement dates because of the Respondent's unlawful action in that the terms of the contract in effect prior to June 11, 2004, remained in effect until the Union and the Company reached agreement on a successor CBA or valid impasse. The Respondent contests the six retirees' and West's and Page's entitlement to the bridge money benefit.

V. The General Counsel's Witnesses

A. Robert Bean

Robert Bean testified, stating that he began working for Newcor Bay City on September 15, 1969; he retired from the Company on June 10, 2004, his last day of work. He explained the circumstances leading to his decision to retire.

By way of background, Bean first noted that during his last full year (2003) of employment, he ran for the elected position of union committeeman and won. Accordingly, he participated in all of the 2004 bargaining sessions, except the last one that took place on June 10, 2004.

Turning to the negotiations with the Company, Bean stated that based on the way the negotiations were going, he came to the conclusion that he was going to lose the bridge money if he did not retire before the expiration of the current contract.

Bean noted that the company negotiators stated on several occasions during negotiations that the bridge money retirement supplement was or had to be eliminated, that this was a nonnegotiable issue, and actually, according to Bean, the Company never really negotiated this matter during the sessions he attended. Bean said (in so many words) that the Company actually was of a mind to slash everything with a "dollar sign" attached to it in the current contract, lending further credence to the elimination of the bridge money, his biggest concern.²¹

Bean further noted that the Company, as he viewed its negotiations stance, was definitely not going to extend the current contract and in point of fact there was little or no negotiating even going on to arrive at a new contract. According to Bean, in an attempt to get the talks moving the Union would make a proffered change in the contract at each session but the Company's stance on the last day of negotiations—its last, best proposal—was the same as the first day. On balance, according to Bean, nothing had changed, essentially there were no credible negotiations, as the Company simply said it was not going to extend the contract. Bean

backpay is Rodney Ruse whose employment ended August 2007 and whose hourly rate was \$19.22 as governed by the collective-bargaining in effect prior to June 11, 2004.

²¹ Bean stated that after the first meeting, the Company proposed to not only eliminate the bridge money, but also wanted wage cuts and an increase in the employees' contribution to medical insurance. (Tr. 263.)

testified that if the Company did not extend the current contract, he stood to lose \$18,000 in bridge money benefits.

Bean volunteered that at the time he was not sure to a certainty that the Company was going to implement its final offer but was 90 percent convinced that it would, because the Company was adamant about not extending the current contract and was insistent about the "package" it wanted included in the new contract. Furthermore, Bean stated that it was also his belief to a 99-9/10 percent certainty that the Union would not accede to the Company's proposal especially with regard to the bridge money, so the only option was to have it imposed on the Union. Bean noted that he did not think that it was unlawful for Newcor to implement its final offer.

Bean said that based on these events and circumstances and after consulting with his wife on the evening of June 9, 2004, he decided to retire to save his bridge money. Accordingly, he called Ron Conklin (of Newcor's human relations) at 7 a.m. on June 10 to schedule a meeting at 9 a.m. on June 10, on which date he signed the appropriate paperwork.²²

Bean recalled that he specifically spoke to fellow employees Richard Pomaville, James Moore, and James Gasta about the state of the negotiations—actually that the Company was not negotiating—and advised them that if they wanted to save their bridge money, they would have to retire.²³

Turning to June 10, 2004, Bean testified he called the Company at around 7 a.m. and later met in the conference room with the company human resource official, Diane Badour, and the union representative, Dave Manze, to fill out the necessary paperwork. Bean could not recall whether Elmer Kostal was present at the time, but that John Van Hurk took his (Bean's) place at the negotiations table.

While Bean testified that he could not recall saying anything in particular about his retirement at the meeting he, nonetheless, at the hearing stated that he did not want to retire on June 10 because he was at the time only 55 years old, at which age he stood to lose 48 percent of his pension. Moreover, according to Bean, he enjoyed his job and wanted to continue working and would have gladly returned to work if Newcor had not implemented its last final offer on June 10 and had continued to bargain.²⁴

Bean stated that it was rumored that a retired person could return to work after retiring, but he could not identify or recall from whom he heard these rumors; he believed that persons who had already filled out their retirement paperwork may have been the source.²⁵ Bean

²² Bean identified documents contained in R. Exh. 19 as his retirement paperwork. Bean stated that prior to June 9, he had done nothing to further the retirement process until he called Conklin at 7 a.m. on June 10. When he arrived at the conference room, the paperwork was completed. It should be noted that Bean was born on August 14, 1948, and on June 10, 2004, was 55 years old, the earliest retirement date according to the pension plan.

²³ Bean believed he told these persons about his concerns and gave them his advice on the bridge money issue about June 1, 2004.

²⁴ Bean said that after his June 10, 2004 retirement, he spoke to the Union's bargaining committee members (to include Kostal, Manze, Van Hurk, and Scott Dennis) at union meetings and found out about the Company's implementation of the offer and the imposition of a new contract.

²⁵ Bean at Tr. 249 is recorded as saying, "I had heard rumors from the other people that had

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candidly stated that no one from the Company made any such representations. Bean said that it was also his belief (assumption) that he had about a month to return to work, but then discovered from other retirees that he only had until July 1 to rescind his retirement.

5 Bean acknowledged observing by the timeclock a notice posted on the Union's bulletin board which stated the following:

To UAW Local 496 Member

10 According to Newcor Inc and Newcor Bay City negotiators, the insurance bridge money is not a negotiable issue. Anyone wishing retire with this benefit must do so before the end of this contract on June 10, 2004 midnight.

15 Respectfully
The Bargaining Committee²⁶

Bean stated that he saw this for the first time some time between June 1 and 10, but he had no part in its composition or posting. Bean noted that the notice was posted for only an hour or two at the most when it was removed by persons unknown to him. Bean stated that while he
20 believed the contents of the notice to be true, or at least consistent with his thinking, the notice itself had nothing to do with his decision to retire effective June 10.

B. Richard Pomaville

25 Richard Pomaville testified stating that he started working for the Respondent on May 22, 1967, as a test shop employee and later on the assembly floor in the weld head building and service departments; his employment ended on June 10, 2009, when he retired.

30 Pomaville explained the circumstances surrounding his decision to retire from the Company after 37 years of service.

Pomaville stated that he kept himself informed about the progress of the Union's negotiations with the Company by speaking off and on with Robert Bean, Dave Manze, Elmer Kostal, Gary Letzgus, and John Van Hurk, all of whom were either union committeemen or
35 pension committeemen involved with the ongoing negotiations. According to Pomaville, he basically checked with everyone involved in the contract bargaining efforts on the Union's side.

Pomaville said that (in these conversations) he learned that the Company was not being flexible in the negotiations and after a time he concluded that he needed to protect his bridge
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already filled out their paperwork that that they had been told that they couldn't come back." This statement is the subject of the General Counsel's motion to correct transcript, which was opposed by the Respondent. The General Counsel asserts that the transcript is inaccurate, especially in light of Bean's testimony on cross-examination that he believed from unidentified
45 sources that he could return to work after retiring. The Respondent asserts that the transcript record should stand and that Bean simply contradicted himself which affects his credibility. The Respondent notes that the General Counsel did not on redirect attempt to correct this statement.

50 I will not grant the motion but consider Bean's testimony in its entirety for purposes of determining his credibility.

²⁶ This notice is contained in R. Exh. 20.

money retirement benefit, about \$18,000, by retiring. Pomaville testified that he believed that the bridge money would be lost on June 10 at midnight. Pomaville stated that he did not know whether Newcor's implementation of its proposal was illegal, but the bridge money was his "big thing" because he needed this money to survive, as it was part of his pension. Pomaville
 5 volunteered that he definitely was not ready to retire as he was only 59 years old at the time, but the possible loss of the bridge money, nonetheless, governed his decision to retire.

Pomaville testified that he understood that about 10–14 employees were going to retire, so he scheduled his retirement for June 9, and signed the paperwork on that date in the
 10 company conference room.²⁷

Pomaville acknowledged that while he signed the final retirement on June 9, he had begun the process as early as June 7 by executing certain forms such as the Federal pension tax withholding forms (R. Exh. 28) and the credit union direct deposit form (R. Exh. 29).
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Pomaville said that while the ultimate decision to retire was his, he was persuaded to retire because of the union bargaining committee's advice that it would be in his interest to retire to protect the bridge money. Pomaville recalled that Elmer Kostal actually read language from the retirement plan at the retirement signing on June 9, and told him he could "unretire."
 20 However, Pomaville acknowledged that he had made his decision to retire before June, being told of this because of the status of the contract negotiations.

On cross-examination, Pomaville was queried by the Respondent's counsel about his interim earnings since he retired.
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Pomaville stated that on or about August 1, 2004, he formed a partnership—Carmine LLC—with himself and his wife as the principals, whose business is building and repairing weld heads. Pomaville testified that he formed this partnership essentially to perform this type of work for Newcor/Wright K, the entity that purchased the assets of Newcor Bay City;
 30 Newcor/Wright K is his sole customer.²⁸

Pomaville identified certain Federal tax returns filed on behalf of Carmine LLC for tax years 2004 (R. Exh. 31), 2005 (R. Exh. 32), 2006 (R. Exh. 33), and 2007 (R. Exh. 34). Pomaville stated that these returns were prepared by his retained accountant and he could not explain the methodology the accountant employed at arriving at the calculations for these
 35 returns. Pomaville stated that the returns were prepared and filed with the Federal tax authorities and he has not been subjected to any audit or review by the tax authorities. Pomaville acknowledged that the underlying records to support the filings came from his records and he placed certain values on his machinery based on his experience in the trade.
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After his retirement, Pomaville stated that he attended a union meeting about June 15, 2004, and Elmer Kostal again informed him about his right to return to work and generally

²⁷ Pomaville identified certain documents contained in R. Exh. 30 as his retirement
 45 paperwork.

²⁸ Pomaville explained that on June 10, 2004, when he retired from Newcor Bay City, there were five or six weld heads in need of repair. About a couple of weeks later, a Newcor official who headed the parts department, Jerry Verlicher, contacted him about doing this repair work and suggested that Pomaville start up a business to do this weld head work, which he had been
 50 doing while employed at Newcor. Pomaville said that he has been performing this type of work for Newcor/Wright K since about August 2004.

discussed the Union's plans for the negotiations; that is, for example, whether the Union was going to settle.

C. James Gasta

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James Gasta testified that he worked for the Respondent for about 35 years beginning on September 2, 1975, and ending on June 10, 2004, when he retired. Gasta said that he started out in the service and test department of Newcor Bay City and later to the electrical department building control panels for aquatic machinery for the last 5 or so years with the Company.

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Gasta recalled the Union's contract negotiations with management around the time he decided to retire and speaking specifically with the Union's committeemen on the bargaining team, Robert Bean and Jeff Ryan, who told him that in order to protect his bridge money he should consider retiring. Gasta stated that the committeemen told him that the Company was not going to budge in negotiations over the (elimination of) the bridge money. Accordingly, Gasta came to the belief that he would lose his bridge money entitlement when the current contract expired at midnight June 10.

15

Gasta volunteered that at the time he thought that it would be unlawful for the Company to implement its final offer, but was not sure of this. Gasta could not recall the exact date he decided to retire but it was sometime after Bean told him that he was going to lose the bridge money if he stayed with the Company.

20

In any case, Gasta stated that he contacted Kostal to begin the retirement process, including preparation of the necessary calculations and paperwork. Gasta recalled he was told by someone whose name he could not recall to come in at a scheduled time to sign the documents on June 9, 2004. Gasta acknowledged, however, that he had actually began his retirement process as early as June 3, 2004, when he executed Federal withholding forms (R. Exh. 21) and the credit union direct deposit forms (R. Exh. 22) so that he would not have to do everything on the scheduled day for signing the retirement paperwork.²⁹ Gasta stated he met with Kostal on June 9 in the company conference room and signed the retirement paperwork.³⁰

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Shown the Respondent's Exhibit 20, the notice to the Union's membership informing them that the bridge money was not a negotiable issue and suggesting that anyone desiring to retire with the benefit had until June 10, 2004 midnight to do so, Gasta recalled seeing the notice either before or after he reached his decision to retire, but that he relied on two union committeemen—Bean and Ryan—in reaching his decision and not the notice. Gasta stated that he did not know who posted it.

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Gasta noted that his effective retirement date would be June 10, his last day of work. Gasta stated he worked on June 10 because the contract did not expire until midnight. Gasta testified that he did not want to retire on June 10 because he liked and enjoyed his job and simply was not ready for retirement; he would have stayed but for the Company's implementation of its proposal.

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²⁹ Gasta also said that he was told that the credit union might have taken 2–3 weeks to process his direct deposit request and he wanted to receive his check by July 1. So he decided to get this form executed before June 9.

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³⁰ Gasta identified his retirement paperwork documents that were contained in R. Exhs. 21 and 22. Gasta was born on December 29, 1945, and was 59 years old on June 9, 2004.

D. James Moore

James Moore testified that he started working for the Respondent on February 16, 1970, as a janitor, then moving up to truckdriver, and finally going to the assembly department as a machine builder. Moore stated his last day of work was June 10, 2004, when he retired.

Moore related the circumstances leading to his decision to retire from the Company after about 34 years of service. According to Moore, the union committee people told the employees what the Company was proposing during the negotiations at the time. Moore recalled that the Company's proposals entailed substantial reductions of wages and insurance and the elimination of the bridge money. According to Moore, these were not only the rumors circulating around the plant, but also the view of union committeemen like Jeff Ryan to whom Moore said he spoke about these matters. Moore also said that the committee people told the employees what the Company was offering, but based on the way the Company was negotiating, it was going to implement its offer, which included elimination of the bridge money.³¹

Moore testified that in this context he became fearful that the Company was going to take the bridge benefit, so he decided to retire along with others who had similar fears.

Moore testified that on June 9, 2004, he began the retirement process because the Union advised that the current contract expired on June 10. Moore recalled that Kostal and Dave Manze for the Union and, for the Company, Ron Conklin and Diana Badour were present when he completed his paperwork.³²

According to Moore, he told Conklin that in fact he (Moore) was not ready to retire, that he was healthy and felt good, and that he liked his job and wanted to keep working at least until he reached 65.

Moore also stated that he believed he could return to work at anytime before July 1, 2004, based on what he had heard from one of the committeemen—he could not specifically identify the person—before he retired on June 9. However, Moore was sure that no one from management made this representation.

E. Thomas R. Schmidt

Thomas R. Schmidt testified that he started working for the Respondent on February 3, 1965, starting in the transformer department and then to the assembly department where he had worked as an assembler for about 30 years until his retirement on June 10, 2004, his last day of work.

Schmidt explained his decision to retire. According to Schmidt, he did not want to retire in June 2004; he had worked for Newcor for about 38 years at that time and liked (loved) his job

³¹ Moore recalled that based on what was rumored, he understood the Company simply would not negotiate with the Union any more and proposed to take the bridge money away. Moore also said that he saw a notice (R. Exh. 20) around June 8, 2004, posted at the plant indicating that the bridge money was not a negotiable issue and discussed it with someone on the bargaining committee at the time.

³² Moore identified R. Exh. 26 as his retirement paperwork. Moore was born on July 1, 1943, and was 61 years old on June 9, 2004.

completely. However, around that time he decided to retire because the contract he understood the Company to be proposing would eliminate the bridge money, and he did not know whether the Company was going to extend the current contract due to expire on June 10. According to Schmidt, he was unsure of what the Company was going to do with the contract but did not think it would implement a contract,³³ he did not want to take the chance of losing the bridge money. Accordingly, Schmidt stated that is why he decided to retire. Schmidt acknowledged that he did not know for certain that the Company would implement its offer and did not know whether such an implementation would have been unlawful.³⁴

Schmidt testified that he completed the retirement paperwork³⁵ in the Company's conference room in the presence of Kostal, Manze, and Ron Conklin on June 9, 2004, but Schmidt noted that he had decided to retire on June 5, and had actually commenced the process around June 8, when he filled out his Federal withholding forms (R. Exh. 24) because certain information had to be compiled before June 10.

Schmidt noted that he consulted with Bean and Kostal about his retirement plans, and Kostal, he recalled, told him it was up to him (Schmidt) if he wanted to retire or not. Schmidt testified that he chose June 10 as his last day of work because the current contract expired that day. Schmidt stated that if the Company had extended the current contract, he would have continued to work at Newcor Bay City.

F. Ronald Rinz

Ronald Rinz testified that he worked for Newcor Bay City beginning in September 1973 and ended his employment on June 10, 2004, when he retired from his last position in the inspections department.

Rinz explained why he retired in June 2004. According to Rinz, the hot topic of conversation around the plant was the Company's proposed contract, which included the elimination of bridge money. Rinz testified that this information was spread by word of mouth among the employees, including the members of the (Union's) negotiating committee. Rinz stated that he came to believe the Company was going to implement the final offer because he heard that the negotiations were going very poorly for the Union. Rinz said before the expiration of the contract, he also saw a notice on the bulletin board (or laying on a table) indicating that the bridge money was not negotiable.³⁶ Rinz also stated that he did not know whether the Company's proposal to implement its proposal was unlawful.

³³ Schmidt used the term "implement" but in my view, given the context of his testimony that followed, I believe he meant "extend" the old contract. (Tr. 280.)

³⁴ Schmidt recalled speaking with Robert Bean who told him the Company was not going to budge on the bridge money position. Schmidt also said that he spoke to other employees who said they, too, were planning to retire. (Tr. 284.)

³⁵ Schmidt identified his retirement paperwork as contained in R. Exh. 25. Schmidt was born on October 4, 1944, and was 59 years of age on June 9, 2004.

³⁶ Rinz identified GC Exh. 16 as a copy of the notice. Rinz stated that on or about February 20, 2010, he provided a copy of this to the General Counsel. It reads as follows:

June 8, 2004

According to Newcor Bay City and Newcor Inc.'s negotiators the insurance Bridge money for Retires [sic] is a non-negotiable issue. Anyone wishing to retire with this benefit, may wish to do so before contract end.

Your Union Committee.

Rinz recalled that at about the time he decided to retire, the Union informed employees that a number of employees were going to retire and suggested that anyone of a mind to retire should submit his name so that the process and paperwork could be started and avoid the rush of applicants at the last minute. Rinz said he was instructed to call the Company's human resources department and schedule an appointment to fill out the paperwork. Having been scheduled for June 9, Rinz said he reported to the company conference room where Ron Conklin and Diane Badour for the Company and Dave Manze and, perhaps, Kostal of the Union were gathered, and he completed his paperwork.³⁷

Rinz testified that if the Respondent had not implemented its final offer on June 11, but continued to bargain, he would not have retired but kept on working (under the old contract). Rinz stated that he was too young to retire and, worse, by retiring in June 2004, it cost him 38 percent of his possible retirement benefits. According to Rinz, he had no desire to retire on June 10, 2004, but did so to protect his bridge money benefits which would end with the expiration of the current contract.³⁸

Rinz also volunteered that he believed that he could still come back to work because he thought that his retirement was not effective until he received his first check on July 1, 2004; therefore, between June 10 and 30, he believed he could rescind his retirement.

After his retirement, Rinz stated that on June 15, he attended the first of many union meetings—the Union meets the third Tuesday of each month—and was told that the negotiations after June 10 were not going well, nothing good for the Union was happening.

G. Thomas West

Thomas West testified that he worked for Newcor Bay City from October 1979 until June 11, 2004, when he was laid off.³⁹ West stated that he applied for his retirement benefits in December 2008 and has been receiving pension benefits since January 2009.⁴⁰

On cross-examination, West testified that he never returned to his position in the service and test department after June 11, 2004, his last day of work. According to West, he had heard from the Union that maybe the Company was no longer in business, but he was not himself sure of this.

³⁷ Rinz identified R. Exh. 27 as a copy of his retirement paperwork. Rinz was born on October 2, 1947, and was 57 years old on June 9, 2004.

³⁸ Rinz testified that he worked his full 8-hour shift on June 10 in the hope that something would happen with the current contract, some good news, to include perhaps a change in the Company's position.

Rinz went on to say that if the contract had been extended, he would have continued to work but would have kept his retirement paperwork in at least until July 1 to make sure he (his bridge money) was protected. Rinz explained that he wanted to cover "both sides of the fence," meaning he wanted to guarantee receipt of his retirement supplement—the bridge money—but also allow himself to return to work without losing the bridge money. Rinz candidly stated he wanted to have the matter entirely covered; he was protecting his self-interest.

³⁹ West identified GC Exh. 13, a copy of his layoff notice issued by the Respondent on June 11, 2004. The notice indicates that West's layoff was effective June 14, 2004.

⁴⁰ The General Counsel's direct examination of West was essentially limited to this information.

West acknowledged that at union meetings he heard from the Union that letters had been received indicating that the plant was closed, but that some (hourly) people were still working there. West noted that he never received any letters to the effect that the plant was closed and the Union did not show him any such letters. However, West admitted that around February or March 2008, the Union did inform him at a meeting that the Company considered the plant closed, but it (the Union) was investigating the matter. West also acknowledged that the Union did not say that any of Local 496 members were still working at the plant at the time but, nonetheless, reported to the members that "things" were observed being moved around, indicating some activity in particular in the laboratory plant, plant #2.

West noted that at this meeting, the Union did not say precisely who was still working at Newcor Bay City. According to West, he personally did not know of any hourly workers who continued to work at the plant after February 2008.

West noted further that the Union did not tell him that the Company had terminated the hourly employees in February/March 2008; only that the plant was closed.

West acknowledged that around February 2008 after the plant closure, he received a vacation paycheck from the Respondent in the amount of \$4500 representing earned and accrued vacation benefits.⁴¹ West stated he believed (assumed) that this check emanated from a prior NLRB proceeding but never asked anyone in the Union what the money was for.

West stated that after February/March 2008, at a union meeting he asked the leadership what was going on and was told that the Union was not 100 percent convinced that the Company had indeed closed and was still investigating the matter. West said this seemed plausible to him because he believed the NLRB case which involved the old contract was still going on, that negotiations were still continuing.

West testified that after February 2008, he never made any effort to contact Newcor, believing he was still on layoff and thought he would be contacted by the Company about his status or any changes thereto.

West volunteered that he really did not know if the plant was actually closed and believed that the claimed closure could be a subterfuge or a name change on the Company's part. West said that when he was employed at Newcor, the Company's practice was to send letters to individual employees regarding their status, either laid off temporarily or permanently, recalled, or terminated. West stated that he had not received any letters from the Company regarding his employment status or any changes thereto. West (reluctantly) agreed that he would expect the Union to have informed him (and other members) of his and others' termination. West noted that the Union never used the term "termination" in the context of discussions at union meetings about the plant's closing.

West also conceded that he never has taken the time or made any effort to see if the plant was still in operation since February 2008, stating that he had no reason to make the 4-1/2 mile trip.

⁴¹ West identified R. Exh. 35, a check stub for the vacation benefits issued for the pay period ending February 17, 2008.

West also admitted that he was told at some point by the Union that all the union people were all "out" but he, nevertheless, assumed because of an ongoing NLRB case, he was still employed by Newcor. West admitted that he never queried Newcor about his employment status because he did not believe it was his responsibility to determine whether he was terminated (fired).

H. Craig M. Page

Craig Page testified that he began working for the Respondent on January 31, 1977, as a laborer, ultimately advancing to machine assembly. Page stated his last day of work was January 31, 2008, when he was laid off due to lack of work.⁴²

Page testified further that he applied for his retirement benefits in December 2008. According to Page, Kostal did not turn in the paperwork until the end of January 2009 and he started receiving his pension benefits on February 15, 2009. Page noted that he did not apply sooner because he had to turn 55 years of age in order to receive his benefits. Page stated that he has not received the supplemental or bridge pension benefits. Page testified that he never received any notice from the Company that he had been discharged or otherwise terminated. However, he was aware that shortly after he was laid off in January 2008, the plant closed in February of that year.

According to Page, he learned of the plant's closure at union meetings and that the Union told the membership that the union jobs were no longer in existence at the plant.

Page acknowledged that after the plant closed, he received a paycheck from the Company for vacation, personal holidays, and earned vacation benefits. Page stated that since employees received a vacation check every year, he thought nothing of the checks. Page acknowledged that vacation checks were usually issued in June of the contract year. Page went on to say that actually he did not know why he received the vacation check for over \$5000 in February as opposed to June, but, nonetheless, cashed it.⁴³

Page acknowledged having filed an unfair labor practice charge against Newcor on July 23, 2008, and an amended charge on August 13, 2008, in which he alleged, inter alia, that the Respondent violated the Act by discriminatorily terminating all of the union employees, including himself, on February 8, 2008.⁴⁴ Page acknowledged that Region 7 dismissed the original and amended charges on September 18 and November 18, 2008, respectively.⁴⁵ Page testified that

⁴² Page identified his first layoff notice dated January 29, 2008, that was signed by his supervisor Ken DeRoche. (GC Exh. 14.) Page identified a second layoff notice DeRoche gave to him on January 31, 2008, changing his layoff date from January 31 to February 1, 2008. According to Page, DeRoche made a mistake in issuing the first notice and corrected the matter by issuing the second notice.

⁴³ Page identified R. Exh. 40, an earnings statement showing that he received monetary credit for earned vacation, personal holiday pay, and vacation in the total amount of \$5650.68. The net amount he received was \$3769.31. Page stated that the check did not include any accompanying letter. Page stated that he did not receive any other payment from Newcor. Page also stated that he thought the Union had settled "something" but he did not think it was his responsibility to find out what it was. (Tr. 439.)

⁴⁴ See R. Exhs. 36 and 37, copies of both charges Page filed with the Board on the dates stated above.

⁴⁵ See R. Exhs. 38 and 39.

he did not file these charges right away—that is, in February 2008—because he did not understand exactly what his job status was. However, at about the time he filed the charges, he had been told by Union Official John Van Hurk that he (and the other bargaining unit members) had been discharged and there was no chance of his (their) going back to Newcor. According to Page, Van Hurk did not say the employees had been discharged for cause. Page noted that Van Hurk made this statement to him at a union meeting just before he filed his original charge.

I. Elmer Kostal

Elmer Kostal testified that he presently serves as the Union's executive president, which he assumed in 2004; Kostal stated prior to 2004 he served as the Union's president for about 28 years. Kostal noted that while the executive president position does not carry superseniority, he still acts as the chief officer of Local 496. Kostal also stated that he was the Union's chief negotiator during the 2004 contract negotiations and served on the pension committee along with John Manze at the time.⁴⁶

Kostal noted that he was employed by Newcor from 1966 through 2003, when he retired. During his tenure, Kostal stated that he negotiated eight collective-bargaining agreements with Newcor Bay City which covered about 200 bargaining unit employees prior to June 11, 2004; by July 2004, he noted there were perhaps only about a dozen or less hourly employees working at Newcor Bay City.

Turning to the negotiations around June 2004, Kostal recalled that the Company had proposed to eliminate certain employee benefits, including health insurance and the supplemental pension benefit called bridge money.⁴⁷ As to the bridge money, Kostal said that from the outset the Company's position never changed—it was to be eliminated in any new collective agreement.

Kostal testified that he (and Manze) was responsible for preparing all of the paperwork for the employees who decided to retire in June 2004; he was responsible for ensuring that the employees' service credits were properly accounted for. Kostal recalled that at the time the company pension representatives were Ron Conklin, a human relations and production manager, and Diane Badour of the Company's finance office and its liaison for pension matters; along with himself and Manze, these persons comprised the pension committee.

Kostal recalled dealing with each of the six retirees and was present when each signed their paperwork prior to June 11, 2004. Kostal noted that he spent about an hour with each man and read aloud to each his pension benefits. Kostal stated that he told each one that they could revoke (rescind) their retirement under certain circumstances.

On this point, Kostal noted that all retirees had to make application for retirement using a standard form that had been in place for about 10 years.⁴⁸ Kostal testified that he informed the

⁴⁶ Kostal noted that Manze was replaced by another union committeeman, Scott Dennis, for calendar 2008–2009.

⁴⁷ Briefly, Kostal explained that under the collective agreement in force in 2004, active employees with a minimum of 5 years of service and eligible for an early retirement—any retirement from age 55–62—and normal—63 and older—retirement are entitled to bridge money in the amount of \$375 per month between age 55 and 62; \$50 per month between 62 and 65; and \$750 per month between 63 and 65.

⁴⁸ Kostal identified GC Exh. 9 as a blank copy of this form, entitled "Employee Application
Continued

six retirees at the time that based on the following language contained on page 7 of the application form, they could change their mind about their retirement decision.

5 You will be permitted to change your form of payment or waive the Qualified Joint and Survivor Option at any time before your benefit payments begin. All changes or waivers must be completed on forms provided by the Employer.

10 Kostal testified that in his opinion, this paragraph gives the applicant the right to change his mind about his retirement decision, that it refers to all nonforfeitable pension benefits and the "changes" include the option of refusing or declining his pension prior to the annuity start date. Kostal further explained that the annuity start date is the first day of the month following the date the applicant signs the application and on which date the applicant gets his first annuity check.⁴⁹ Kostal insisted he read the application form's contents, including the paragraph on page 7, to the six retirees individually at the time they submitted and signed the application form.

15 Turning to the instant compliance specification, Kostal testified that he provided the monthly pension figures for the six retirees as if they had continued work for the Company until their respective end of employment dates, that is, the retirement dates based on data provided by the Board agent who devised the specification. In short, according to Kostal, he utilized the pension benefits agreed to by the Company and the Union when the six originally retired, then added the amount of time the Board agent had determined, and then recalculated their benefits as of that later date.⁵⁰

25 Kostal testified that under the old pension plan, anyone who retired under age 63 stood to lose 6 percent of his pension benefits for each year under that age; essentially, according to Kostal, the retiree under age 63 loses 1/2 percent per month.

30 Turning to the issue of the Newcor plant closure,⁵¹ Kostal admitted that he (the Union) was informed of the Bay City plant's February 8, 2008 closure by the Respondent by letter dated February 11, 2008; the Union in this letter was also informed that the Respondent had sold its assets to a company called Wright K Technology, Inc., and that the employment of all hourly employees were "terminated" as of February 8, 2008.⁵²

for Retirement Newcor, Inc. UAW Local 496 Pension Plan."

35 ⁴⁹ Kostal noted further that his opinion was supported by various provisions of the then current collective-bargaining agreement and the Newcor, Inc./UAW Local 496 pension plan. (GC Exh. 7.) According to Kostal, Art. 7.3 of the agreement allows an employee to return to work if his former job has not been posted; Art. 3.8 of the pension plan permits a retired employee to return to work, but his benefits are suspended as a rehired employee. The annuity start date is defined in Art. 6.1 of the pension plan. It should be noted that Kostal did not testify that he told the six retirees that these provisions of the agreement and the pension plan were operative in their respective cases, especially in terms of their being able to rescind their decisions to retire.

40 ⁵⁰ The Board agent, Richard Czubaj, who testified at the hearing, devised the instant specification which, as noted earlier, is not contested by the Respondent.

45 ⁵¹ It is noteworthy that while Kostal was initially examined about the plant's closure by the General Counsel, most of his testimony on this matter was elicited by Respondent's counsel on cross-examination.

50 ⁵² Kostal identified a copy of the letter which is contained in R. Exh. 3. Notably, the quotation marks around the word terminated appeared in this letter. This letter also informed the Union that all eligible employees would be paid any vacation and paid personal holiday pay

Continued

Kostal acknowledged that he had not personally observed any business activity at the Bay City plant, and that to his knowledge none of the Local 496 bargaining unit employees have worked at the plant since February 8, 2008. Kostal also acknowledged that since the plant's closure he has been involved in effects bargaining with the Respondent. However, according to Kostal, the Union took the position that the bargaining unit employees were not terminated or discharged, but merely laid off for lack of work.

Kostal testified that, in his view, the only proof to him that the plant had closed and ceased doing business came from Newcor's letters, so the Union considered the employees not to be discharged for cause within the meaning of the collective-bargaining agreement which requires in Article 4, Section 4.6(2) that an employee's seniority is lost only by dint of discharge. Kostal also testified that his layoff position was also buttressed by the Company's failure to send termination notices to the affected employees, something that it had always done in the past when an employee was discharged. According to Kostal, a discharge could in fact be or result in a return to work in the case of a discharged worker being returned to work after a successful grievance. Kostal stated that in his view, this was equivalent to an initial termination.

Kostal acknowledged and identified several documents that the Union prepared and submitted to the Board challenging the Respondent's actions associated with the business closure and the Board's response thereto. For instance, Kostal identified an August 6, 2008 charge he filed on the Union's behalf regarding the sale of the Respondent's assets (R. Exh. 4); and the Board's response to his appeal of Region 7's refusal on November 10, 2008, to issue a complaint (R. Exh. 5). Kostal agreed that the Board found no merit to his charge, and specifically determined that Newcor terminated all of its employees incidental to the sale of its assets to Wright K.

However, Kostal stated the Union, in spite of these findings, persisted in its position that the unit of employees was not discharged, but laid off because of lack of work and that the plant was not closed.

Kostal noted that the Union believed the contract required that the Union be notified prior to the actual firing or termination of an employee or employees in this case.⁵³

Kostal, referring to the February 11 letter from the Respondent, stated that this was not the first time the entire work force was (as he put it) laid off. Kostal recalled that in December 2002, the Company laid off the entire bargaining unit for the Christmas break while there was plenty of work, and then recalled the entire work force after New Year. Kostal believed that the February 2008 notice was equivalent to that.

All in all, Kostal testified that the Union's position is and has always been that the bargaining unit employees were laid off and not terminated as of February 8 and, being in layoff, all such employees were "active" employees who still maintained their respective seniority rights at the time they applied for retirement benefits to include the bridge money. According to

to which they were entitled; that the Company would provide 2 months of health insurance due to their termination, and the Company was amenable to "effects" bargaining over the closure.

⁵³ Kostal referred to Art. 7, dealing with Discharges and Voluntary Termination, and in particular Sec. 7.2 which requires in the case of layoff and discharges that the Company notify the Union (shop committee) of all notices of discharge when they occur.

Kostal, West and Page were thereby entitled to the bridge money benefits when they applied for retirement.

VI. The Respondent's Witness: Robert Conklin

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Conklin testified that he currently works for Newcor, Inc. as a senior quality engineer at RGI Deco Engineering (RGI) an affiliate located in Clifford, Michigan. However, from December 1995 through around December 2007, Conklin said he worked for Newcor Bay City, starting first as a quality manager until 2002 and then from 2002 until his transfer to RGI as a human relations manager. Conklin noted that his human relations duties and responsibilities included the administration of the Company's health benefit plans, workers compensation, safety, and union matters, including grievances and retirements. Conklin stated that his duties included administering the UAW pension plan at Bay City and that he was a member of the pension committee during this time.

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Conklin testified that the Newcor Bay City plant closed and ceased doing business in that name on February 8, 2008, because of declining business; its assets were sold to Wright K.

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By way of background, Conklin explained the nature of the Newcor Bay City business and its operations prior to the sale of the Company. Conklin said that Newcor Bay City's primary business was designing and building welding and assembly equipment. Newcor Bay City also carried on a parts business, essentially the parts used to service the equipment it built and sold. The plant facilities included three buildings designated plants #1, #2, and #3. Plant #1 was used basically as an office facility for the accounting, engineering, and manufacturing departments although some equipment for other facilities are stored there; plant #2 was used as a research and development facility and was sometime referred to as the laboratory or lab building; and plant #3 was the primary production facility that included the machine shop, machine assembly, parts assembly, and shipping departments.

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Conklin also described the business of RGI as a high volume manufacturer of component automobile parts, such as transmissions and axle shafts, for Ford Motor Company, its primary customer, and Detroit Diesel Co. Conklin described RGI as a high production machine shop, unlike Bay City which was a designer and builder of equipment. Conklin noted that parent, Newcor, Inc., also has another high volume parts business—MTG in Corrina, Michigan—which is similar to the RGI operation.

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Conklin said that when Newcor Bay City closed, everything except the fixtures were sold to Wright K Technologies, including all machinery, equipment, parts and material, along with the intellectual property such as drawings, patents, and the Company's name. After the sale, according to Conklin, Newcor Bay City had no ongoing business relationship with Wright K except that Newcor, Inc. leased plant #2, the R and D lab, to Wright K and that lease arrangement currently exists. Conklin testified that plants #1 and #3 are empty except for the fixtures and have not been in business since February 2008. Conklin recalled that at the time of the closure of Bay City, there was only one hourly employee working at the plant, John Van Hurk.

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Turning to his human relations duties in 2004, Conklin testified that he was familiar with the pension plan (and its retirement provisions) between Local 496 and Newcor Bay City, and at the time he, as the human relations manager, participated in the contract negotiations as a

member of the company bargaining team.⁵⁴ Conklin acknowledged that the pension plan bridge money was part of the negotiations and the Company proposed elimination of this benefit for the new contract. But, in fact, the Company never took the position that the bridge money issue was not negotiable and presented other proposals.⁵⁵

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Conklin stated that he was familiar with the six retirees and was involved, along with Diane Badour of the accounting department, in determining their credited service hours through their proposed retirement dates; the information was provided to the Union (Kostal) to calculate the individual employee's retirement benefits.⁵⁶ The Union would use these calculations to prepare the employee's retirement documents. After the documents were prepared, according to Conklin, Badour would review them for accuracy and completeness; tax withholding forms would be completed and submitted by the retiree and direct deposit would be arranged for those desiring this.

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Finally, according to Conklin, there would be a meeting with the individual employee who would review and verify the correctness of the information for himself and, where applicable, his spouse. Once signed off by the employee, the pension committee would meet to review and approve the retiree's application, and this was the final step.

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According to Conklin, all retiree applicants have to indicate a proposed retirement date on the application form.⁵⁷ In the case of the six retirees, Conklin noted all were to retire on June 10, 2004. In any event, Conklin testified that once an employee retires, he has no employment relationship with the Company and according to the contract, all seniority ends.⁵⁸

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Regarding bridge money benefits—the special supplemental monthly benefit (under Art. 3, Sec. 3.2(b))—Conklin noted that unless eligible, the retiree would only receive his normal pension benefits. He also noted that at the time of retirement, the retiree would receive any wages due, any unused vacation, and personal paid holiday pay (pph).⁵⁹ Conklin also noted that in the case of terminated employees, wages and the vacation and pph benefits are paid at the time of separation from employment (as was the case with West and Page).

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Conklin stated that with respect to the six retirees, once their respective retirement dates passed they could not have rescinded their retirement and there is no such thing as a conditional retirement under the pension plan. Conklin specifically testified that the retiree cannot “unretire” before receiving his first retirement check. Directly countering the testimony of Kostal, Conklin stated that the retirement application form on page 7 dealing with “changes” and

⁵⁴ Conklin stated he attended all of the negotiating sessions up to June 9 and 10, 2004.

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⁵⁵ Shown a copy of R. Exh. 20, the notice allegedly posted by the UAW bargaining committee indicating that the bridge money elimination was not negotiable, Conklin refuted its contents as untrue.

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⁵⁶ Conklin identified copies of document screen shots for the six retirees that were generated by the Respondent (Badour) showing the individual credited hours of service for each man through their proposed retirement dates, universally June 10, 2004. See R. Exh. 18.

⁵⁷ Conklin indicated that the retirement application form contains a line for the commencement of the applicant's retirement and, once shown a blank form (GC Exh. 9), identified the line on p. 6 of the form.

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⁵⁸ See Art. 4, Sec. 4.6(A) which states “Seniority shall be broken for the following reasons:

(1) Voluntary quit or retires.” (GC Exh. 7.)

⁵⁹ Conklin stated that generally all vacation pay was provided in June of the contract year in question. (Tr. 471.)

“waivers” means that the retiree can either opt for a lifetime benefit (annuity) or the qualified (joint) survivor benefit either in 50 percent, 75 percent, or 100 percent benefit amounts before benefit payments began. Conklin noted that the changes and waivers part of the application in no way confers on the retiree a right to rescind his retirement; it relates solely to the form of the retiree’s payment.

Conklin, in direct contradiction and opposition to Kostal’s interpretation of the collective agreement and pension plan, also testified that other provisions thereof do not confer any rescission rights to the retiree.

As to the collective agreement, Conklin said that Section 7.2 (Art. 7) did not apply to the retirement situation. Rather, it deals with layoffs, discharges, and voluntary quits and the Company’s responsibility to notify the Union of such actions.

As to the pension agreement, Conklin stated that Article 1 speaks to definition of terms employed in the agreement. Conklin notes that Section 1.4 defines the annuity start date as the first date one is entitled to receive his benefit payment. Section 1.39 defines “retirement” as a participant’s termination of employment with the Company. Section 1.41 defines termination of employment whether voluntary or involuntary for any reason, including but not limited to quit or discharge. Conklin stated that “for any reason” covers retirement either normal or early.

Conklin also spoke to the power and authority of the pension committee established and governed by Article 9 which deals with the administration of the pension plan, stating that no single member of the committee can interpret the plan and make binding decisions on the entire committee; there must be a majority (at least three of the four members) voting for a measure. Conklin noted that during his time on the committee it has never permitted anyone to revoke or rescind his retirement and no employee has ever made such a request.

Conklin was firm in his view that the plan simply does not allow for rescission of retirement and if any of the six retirees had asked about this or sought it, the committee would not have processed his application. Conklin stated that basically an employee elects to retire unconditionally or not.⁶⁰

Turning to the six retirees, Conklin recalled participating in the individual meetings with them on June 9 or 10. Conklin stated that per the usual procedure, he and they reviewed the paperwork and went over the matter for their understanding; each retiree signed off and the committee approved each man for retirement. Conklin stated that no one from the Union told any of the men that he could rescind his retirement up to July 1, 2004.

Conklin volunteered that he fully understood the retirees’ issue or dilemma regarding retiring to protect their bridge money benefit and that anyone who retires “early” suffers a penalty of 6 percent per year for each year under the normal retirement age of 63.

Conklin then turned to the retirements of West and Page.

⁶⁰ It is noteworthy that Art. 9 of the pension plan in my view rather comprehensively deals with the administration of the plan by and through the pension committee whose actions and decisions are governed by specific provisions establishing procedures and limitations on its authority. Most notable for purposes of the instant case, the pension committee may not take any action deemed discriminatorily beneficial to one participant or a group of participants. (See Sec. 9.5.)

Conklin acknowledged that both men retired under the reinstated 2001–2004 collective agreement with the Union. According to Conklin, under that contract both Page and West were not active employees at the time of their retirement because they had been terminated as of
 5 February 8, 2008, when the Newcor Bay City plant closed and the Union was notified of such fact by the Company's February 11, 2008 letter. Accordingly, since the two were not active employees at the time of their respective retirement applications, they both were not entitled to the supplemental—bridge money—pension benefit.

10 Conklin also acknowledged that irrespective of the Company's position regarding West and Page's ineligibility for the bridge money, three other former employees who retired similarly to West and Page had been determined to be eligible for this supplemental benefit. However, Conklin testified that these authorized payments were made by mistake. He explained.

15 Conklin identified the three retired employees mistakenly authorized to receive bridge benefits as Rodney Ruse, Dale Sigmund, and Terry Schmidt. According to Conklin, Ruse, Sigmund, and Schmidt were all terminated on February 8, 2008, like West and Page, and began receiving their retirement benefits to include the bridge money on April 1, 2008, in the case of Ruse and Sigmund, and on September 1, 2008, in Schmidt's case.⁶¹

20 Conklin noted that like West and Page, Ruse, Schmidt, and Sigmund were terminated on February 8, 2008, when the plant closed and the three applied for their retirement after that date when they were clearly not active employees as required by the contract to receive bridge monies. Conklin stated that he was not involved in the processing of the three men's retirement applications. However, when West and Page applied for retirement, Scott Wright, the human
 25 relations director, contacted him questioning their eligibility. According to Conklin, both he and Wright discussed the matter and determined that West and Page were not eligible for the bridge supplement, but further that Ruse, Schmidt, and Sigmund had been mistakenly extended these benefits because they, too, were not active employees at the time of their retirement. Conklin
 30 conceded that in spite of the mistake, the three continue to receive those benefits and the Company has not taken any steps to correct the situation, largely because of the continuing litigation surrounding this matter. Conklin went on to say that, nonetheless, the Company did not want to repeat the mistake and give West and Page benefits to which they were not entitled.⁶²

35 Regarding West's and Page's termination, Conklin testified that the Company viewed its notification by letter to the Union on February 11, 2008, informing it that the entire complement of hourly workers was terminated, as sufficient notice to all employees under the contract.⁶³ Conklin also stated that the Company took the view that the plant's closure and sale of assets
 40 constituted significant cause for the termination of the hourly workers.

45 ⁶¹ See R. Exh. 49, Ruse's authorization to the plan trustee; R. Exh. 50, Schmidt's authorization to plan trustee; and Sigmund's R. Exh. 51. See also R. Exh. 48, a document prepared by Conklin for the hearing listing the termination and retirement dates of nine employees, including Ruse, Sigmund, and Schmidt as well as West and Page and the amount of their monthly retirement benefits.

⁶² Conklin identified R. Exh. 52 as a copy of the letter Scott Wright sent to Local 496 (Kostal) on February 5, 2009, stating its reason for not extending the bridge money benefit to West and Page. Conklin stated that he was aware that the letter was sent to the Union.

50 ⁶³ Conklin again referred to Sec. 7.2 of the contract which required the Company to notify the Union of all discharges.

Conklin went on to say that the Company believed that it was unnecessary to notify the employees individually because the Union, as the employees' representative, was responsible for notifying its members of their termination.

Conklin also stated that both Page and West received their vacation pay in February 2008, when ordinarily they would receive this in June of the contract year. Conklin implied that they should have realized that they had been terminated in February 2008. Furthermore, Conklin noted that the Union and Company began "effects" bargaining over the payouts associated with the termination in April 2008; it should have been clear to all that the payouts to employees in February were due to the plant closure and the termination of the hourly employees.

Conklin also emphatically denied that West and Page were laid off and therefore did not fall within the coverage of Section 4.6(A)(5) which states that an employee loses his seniority by being, inter alia, continuously laid off for 3 years.⁶⁴ Conklin stated that West's and Page's seniority was broken under Section 4.6(A)(2) because they were discharged (terminated) on February 8, 2008, and on this score were not active employees entitled to the bridge benefit when they applied for retirement money months later.

Conklin testified that in his view West and Page actually were deferred retirees because their retirement application occurred after their termination date,⁶⁵ and would not be eligible for the bridge money.

VII. The Positions of the Parties

A. The General Counsel's Position

The General Counsel asserts that this matter presents essentially two issues:

1. Whether the Respondent constructively forced the six retirees, Bean, Gasta, Moore, Pomaville, Rinz, and Schmidt, into retirement effective June 10, 2004, because of its established and known intention to implement its last offer (later determined to be an unlawful act) at the time of the expiration of the parties' agreement, and should make the six retirees whole for their losses of benefits; and

2. Whether employees West and Page are entitled to their supplemental pension benefits—the bridge money—because of the Respondent's failure and refusal to comply with the Board's Order to retain these contractual terms and conditions of employment.

⁶⁴ However, the section provides that employee with more than 3 years' seniority will retain their seniority time for time up to 5 years.

⁶⁵ Conklin stated that when an employee has become vested in the retirement plan—working for the Company for at least 5 years—but for whatever reasons terminates his employment voluntary or nonvoluntary before his earlier retirement date (55 years of age), he can upon reaching that age apply for his retirement benefits and is said to be a deferred retiree. According to Conklin, deferred retirees are not considered active employees because they were not employed or in a layoff status with unexpired seniority at the time they applied for retirement benefits. By not being active, such a deferred retiree would not be eligible for the bridge money.

The General Counsel submits that the Board's Order explicitly required the Respondent to reinstate all prior terms and conditions of employment prior to June 11, 2004, and to maintain in effect those terms until the parties bargained to an agreement or reached a valid impasse. The General Counsel further submits that the objective in compliance proceedings is to restore the status quo ante to the extent possible to where the parties stood with respect to one and the other prior to the conduct determined to be unlawful, and that any uncertainties attendant to this effort should not be resolved in favor of the wrongdoer, here Newcor Bay City. The General Counsel contends that on this record, the six retirees were clearly constructively discharged (retired) by and through the unlawful conduct of the Respondent.

The General Counsel concedes that the case of the six retirees presents a rather novel situation in that here each retiree (employee) was forced to make a decision about his continued employment regarding benefits they had already earned but could lose, whereas in the normal situation for purposes of a constructive discharge employees have to make an employment decision with regard to future possible terms and conditions of employment to determine if they are tolerable. The General Counsel asserts that, nonetheless, the six retirees faced a classic Hobson's choice—retirement before implementation and save their earned benefits or continue working under the Respondent's last offer and lose those benefits with an undisputed value of as much as \$18,000.

The General Counsel submits that employees in the position of the six retirees should not have to wait until after the Respondent commits an unlawful labor practice in order to protect their already earned benefits.

The General Counsel notes that in the instant case the Respondent waited until 7 p.m. on June 10, after regular business hours, to implement its last final offer when, in fact, the decision to implement was made much earlier.

The General Counsel essentially contends that in this case the six retirees should not be held to an automatic or per se rule that would require them to have applied for their already earned retirement benefits after the Respondent's formal announcement of its intent to implement its final offer—later determined to be unlawful—in order to receive the benefit of the Board's make-whole remedy. The General Counsel submits that such a rule could result in a win-win situation for the Respondent and a major detriment to the retirees.

On this score, the General Counsel contends that if the implementation was deemed legal the employees would have lost their vested benefits; but if deemed illegal, employees who retired to protect their rights would have no remedy even though against their personal desires and their economic interest they retired early. In short, the General Counsel contends that in the pursuit of a proper make-whole remedy, the Respondent should not be advantaged by its unlawful conduct, and to a certainty, nor should the retirees here suffer a detriment because they sought to protect benefits earned under the contract the Board (and the court) ordered reinstated.

The General Counsel argues that West and Page are entitled to the bridge money supplement retirement benefit because the Board's Order required reinstatement of the 2001–2004 contract in all of its terms and conditions and to maintain those terms until the parties bargained to an agreement, or came to a valid impasse, or the Union agreed to changes.

Noting that the contract's terms indisputably included the bridge money benefit, the General Counsel contends that the Respondent erroneously believes that the Company's closure of the Bay City plant and selling of its assets relieves it of its obligations under the

contract. Moreover, according to the General Counsel, the Company erroneously contends that West and Page were discharged upon closure of the plant and, pursuant to the contract at that time, lost their seniority and eligibility for the bridge money.

5 The General Counsel counters, arguing that the closure of the plant did not render the contract nugatory, and West and Page's layoff status did not change, inasmuch as they were not individually notified of their discharges by the Respondent. The General Counsel submits that West and Page's retirement while in layoff status differed in no relevant way from other employees who retired after a period of layoff but still received the bridge money benefit.

10 The General Counsel points out that here, three employees who retired after the plant's closure are receiving the bridge money. Recognizing the Respondent's claim that this was a mistake, the General Counsel, nonetheless, asserts that Scott Wright, human resources manager, processed the retirements of the three mistaken retirees. He notes that Wright held a higher position than Conklin in the Company's human relations hierarchy. The General Counsel submits that Wright was the only person who could have adequately explained why the three received bridge money and why West and Page were denied the same treatment. The General Counsel further notes that Wright was available for testimony at the trial, but departed the proceedings without being called by the Respondent. The General Counsel suggests that an adverse inference could be drawn that Wright's testimony would have been unfavorable to the Company.

25 The General Counsel also submits that neither Wright nor Conklin possessed the authority to deny West and Page the bridge money because the pension plan under Section 9.2 provides that the pension committee shall interpret and determine all questions arising under the plan. He notes that neither Conklin nor Wright broached the matter to the pension committee which under the extant provisions would more properly make a determination as to whether West and Page were entitled to the supplemental benefit. The General Counsel submits that under the plan, there is no justification for denying West and Page their bridge money.

B. The Respondent's Position

35 The Respondent essentially frames the issue involving the six retirees as follows: Are the six retirees who voluntarily retired before the commission of the unfair labor practices entitled to receive the supplemental retirements—bridge money—under the 2001–2004 collective-bargaining agreement as set forth in the compliance specification?

40 As to employees West and Page, the Respondent frames essentially the issue as follows: Are West and Page who submitted their retirement applications over 10 months after they were terminated by the Company entitled to receive bridge money as set forth in the compliance specification?

45 The Respondent contends that the answer to both questions is that neither the six retirees nor West and Page are entitled to an award of payments as set out in the specification.

50 Regarding the six retirees, the Respondent first notes that Region 7 initially determined that the six employees voluntarily retired before the commission of any unfair labor practice by Newcor Bay City and were not constructively discharged (retired) so as to be entitled to

backpay.⁶⁶ The Respondent noted that the Region's decision was a reversal of its earlier decision that the six retirees were entitled to backpay.

However, the Respondent notes that the Union appealed the Region's decision to the Board which on April 24, 2009, issued an order remanding the matter to the Region to address the issue at a hearing as part of the pending compliance proceedings and develop a factual record on the relationship, if any, between the Respondent's unfair labor practice and the June retirees' decisions to submit their applications for retirement on June 9 and 10, 2004.⁶⁷

The Respondent contends that although the Board's Order did not explicitly find that the six retirees were entitled to inclusion in the class of employees' entitled to the make-whole remedy, the Region, nonetheless, included them in the Fifth Amended Compliance specification without first developing a factual record. The Respondent asserts the Region improperly assumed their inclusion in that class in opposition to the Board's direction to develop a factual record that would permit a determination of whether the six should be included in that class. The Respondent argues that to include the six in the class before the development of a factual record was inappropriate and violative of the Board's remand order.

The Respondent also asserts that the ruling by only two Board members (Chairman Liebman and Member Schaumber) is unlawful under 29 U.S.C. §153(b).

Moving on to the issue of whether the six retirees are entitled to make-whole relief, the Respondent asserts that when an employer unlawfully declares impasse and implements a final offer, the remedy addresses the time period after the commission of the unfair labor practice because the make-whole remedy relates to the "results" of the unlawful conduct. The Respondent submits that the Board's Order in the instant proceeding conforms to traditional remedy, that is, to make the Newcor employees whole for any losses they suffered as a result of the Company's unlawful action.

The Respondent notes that even the General Counsel concedes that the six retirees voluntarily retired in anticipation of the Company's possible future action adversely affecting their retirement benefits, and not as a "result" of the Respondent's unfair labor practices.

In short, the Respondent argues that the Company's unlawful implementation did not and could not logically have caused the six to retire because the unlawful act had not occurred.

The Respondent notes further that the Company's proposal to eliminate the bridge money was not in and of itself an illegal act. On the contrary, the Respondent asserts that its proposal in this regard constituted a lawful collective-bargaining demand provable by the Union's failure to file a charge on this point as well as the Board's decision not to include this allegation in the complaint heard at the trial.

⁶⁶ See R. Exh. 1, Region 7's Reply to the Charging Union's Request for Review of General Counsel's Denial of Its Appeal of Compliance Determination in which the Region, inter alia, discussed at length the concept of constructive discharge and related theories presented in varying cases that dealt with the issue and determined that in the case of the six retirees, it could not prevail in a compliance proceeding because they voluntarily retired before the Respondent's commission of any unfair labor practices on the theory of constructive retirement.

⁶⁷ See GC Exh. 1(mm).

The Respondent avers that it had nothing to do with the decision of the six to retire and, in fact, they retired in part based on the advice of the Union and in part based on their own personal perceptions about what was transpiring in the ongoing collective-bargaining process. The Respondent concedes that each man basically retired because of their perceived
 5 uncertainty about what might happen in the collective-bargaining process and all were unwilling to risk losing their bridge money benefits. However, the Respondent contends that the vagaries of the collective bargaining going on at the time bear no causal relationship to the later committed unfair labor practice findings.

10 The Respondent also contends that each retiree, except Bean, decided to retire up to about 2 weeks before the commission of the unlawful acts by the Company. All in all, the Respondent contends that each retiree made a rational and volitional decision to protect his bridge money benefit before the contract expired. Each man essentially decided that retirement served his interest more than any possible economic benefits associated with continued
 15 employment with Newcor Bay City. In any case, the Respondent argues each retiree's decision was not in any way caused by or was the result of the Respondent's conduct later determined to be unlawful.

20 The Respondent also contends that the six retirees were not constructively discharged or retired by dint of the Company's proposing the elimination of the bridge money, a lawful proposal, before 7 p.m. on June 10. The Respondent submits that even the General Counsel could not find relevant Board authority to support a constructive retirement theory as applied to the six. For instance, the Respondent notes that the six retirees never provided any formal documentation to the Company that their retirements were conditional based on their concerns
 25 about a future event, to wit, the elimination of their bridge money benefit. The Respondent further points out that the underlying complaint did not include any reference to constructive discharge or retirement. The Respondent argues that under the circumstances, then extant, the six retirees were not faced with anything comparable to a Hobson's choice of either resigning (retiring), giving up their Section 7 rights, or otherwise working under conditions deemed so
 30 difficult and unpleasant that they were forced to take the action they did. The Respondent asserts that the proposed elimination of the bridge money posed nothing severe enough to be deemed so difficult and unpleasant so as to force the six into retiring.

35 The Respondent submits that when the retirees elected to retire effective June 10, 2004, they had no contractual right to rescind their retirements up to July 1, 2004. The Respondent contends that, to the extent the General Counsels' theory of permissible inclusion of the six in the class of employees to be awarded payment under the compliance specification because of this "right," this is neither factually nor legally proper.

40 The Respondent contends that the Board's April 29, 2009 order does not encompass this theory, limiting the determination to be made to the development of factual record on the relationship, if any, to the Respondent's unlawful conduct and the six retirees' decisions to apply for retirement on June 9 and 10, 2004. What the retirees might have done after those dates, the Respondent avers, exceeds the scope of the Board's directive. Moreover, the Respondent
 45 submits that the credible evidence regarding the retirees' rights under the contract and pension plan undercuts the very notion that they could have rescinded their retirements. In short, they did not have any right to "unretire" (or conditionally retire) before July 1, 2004, and their employment unequivocally terminated along with any seniority rights based on a proper interpretation of the contract and pension plan; any assertion by the General Counsel to the
 50 contrary is without merit.

Turning to the matter of West and Page, the Respondent first contends that they are also ineligible for the bridge money benefit because the collective-bargaining agreement ended with the closing of the plant and terminated the bargaining unit employees' employment on February 8, 2008. Accordingly, the ending of the collective-bargaining agreement therefore ended the contractual bridge money benefit for any of the bargaining unit employees like West and Page.

Admitting that it (nor the General Counsel) could find direct Board authority for the proposition that a collective-bargaining agreement does not survive the closing of a plant and the termination of employees, the Respondent submits that, nonetheless, the case of *Eazor Express* (271 NLRB 495 (1984)) provides a proper analogy for application to the facts here.

In *Eazor Express*, the Respondent notes that there was a lawful closure of the plant and a lawful layoff of all the employees about 10 days before the parties' contract expired. The Board held that the Company violated Section 8(a)(5) by not providing requested information pertaining to pre-expiration matters but not post-contract expiration matters.⁶⁸

The Respondent alternatively asserts that West and Page were ineligible for bridge money because under the contract they were not "actively employed" when they retired after the plant closed and their employment was terminated on February 8, 2008.

The Respondent contends that Page admitted that he knew his employment had ended when the plant closed on February 8. Moreover, the Respondent notes that Page filed an unfair labor charge against Newcor and was informed by the Board that the employees were terminated when the plant closed and the Company assets were sold for legitimate business reasons. In this regard, the Respondent asserts that the closing of the plant constituted "cause" for a termination⁶⁹ and that the parties' agreement specifically provided for termination of employment for cause.

The Respondent asserts that the General Counsel's and the Union's claim that the Company lacked "cause" to discharge the bargaining unit employees because they had done nothing wrong (regarding their personal misconduct or in violation of work rules) is wrong and misguided, because the plant's work rules, as applied to the employees, do not even address the closing of the plant. The Respondent asserts, however, that the management-rights provisions of the contract between the Union and the Company encompass the right to close the plant for economic reasons—in short, the "cause" here for the termination of the bargaining unit employees.

Related to this point, the Respondent argues that any claim that the Respondent continues to do business at the Bay City facility is completely without merit. The facts are plain and indisputable—the Company sold its assets and closed the facility. Furthermore, the Respondent asserts that Kostal's testimony on this count was completely disingenuous and intellectually dishonest and should be rejected, especially when he claimed that the Union

⁶⁸ The Respondent also cited *Rice Growers Assn. of California*, 312 NLRB 837 (1993), as being in accord with *Eazor Express*. In *Rice Growers*, an information request case, the plant had been closed for about 2 months and the employees laid off, but the contract had not expired. The requested information covered subcontracting and the Board ruled that since there was no unit work to be subcontracted—there were no workers then employed—the request was deemed irrelevant.

⁶⁹ The Respondent cites Michigan legal and labor arbitration authorities for this proposition.

viewed the employees as having been laid off for lack of work, but not terminated because the employees were not individually notified of their “discharge.”

The Respondent asserts that the contract requires West and Page to be actively employed at their retirement to be eligible for the bridge money benefit; and their active status ended (contractually) when they were terminated on February 8, 2008. When West and Page applied for retirement in December 2008, they did not meet the requirement for the bridge money benefit. Accordingly, they should not be awarded the bridge money as set out in the specification.

The Respondent acknowledges that the three former employees similarly situated to West and Page indeed received the bridge money, but by a mistake. The Respondent argues a mistaken payment to them should not convert West and Page from ineligible to eligible for the bridge benefit. Citing *Foster Transformer Co.*, 212 NLRB 936 (1974), the Respondent contends that it should not be bound to continue in effect and practice an erroneous and inequitable plan, procedure, or act based on a mistaken course.⁷⁰

The Respondent contends that it had to decide between two unattractive options: (1) discontinuing and recouping the erroneous payments to the three similarly situated employees and while not initiating erroneous payments to West and Page; (2) not initiating erroneous payments to West and Page to prevent a repetition of the erroneous payments, but not correcting the previous errors at the present time to defer the correction of Ruse, Schmidt, and Sigmund’s erroneous payments. The Respondent asserts it took the latter course as a rational and reasonable business choice that should not be used to give West and Page a benefit to which they are not entitled.

The Respondent conceded that the pension committee not only did not meet about the bridge money determinations for West and Page, but also did not meet for the mistaken bridge money recipients Ruse, Jerry Schmidt, and Sigmund.⁷¹

Applicable Legal Principles

A. The Law Applicable to Backpay Compliance Proceedings

With respect to compliance proceedings, the Board has established well-settled principles governing the resolution of backpay disputes through its own and Court proceedings.

Generally, where an unfair labor practice has been found, some backpay is presumptively owed by the offending employer in a backpay proceeding. *La Favorita, Inc.*, 313 NLRB 902 (1994), enfd. 48 F.3d 1231 (10th Cir. 1005).

⁷⁰ The Respondent also cites other authorities in support of the proposition that it should not be bound by its erroneous interpretation of the eligibility requirements for plan benefits to include *Eagle Transport Corp.*, 338 NLRB 489 (2002), incorrect granting of wage increases to some employees because of computer error; *Daycon Products Co.*, 2010 NLRB Lexis 10, restoration of agreed-upon wages to conform these to those previously negotiated by the parties; and *Uniflex Holdings*, 2007 NLRB Lexis 1, inadvertently making erroneous payments to a union pension fund for 13 months and correcting the error.

⁷¹ See R. Br. at p. 42, fn. 15.

The objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restoring the circumstances that would have existed had there been no unfair labor practices. *Hubert Distributors, Inc.*, 344 NLRB 339 (2005); *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998), citing *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

The General Counsel's burden is to demonstrate the gross amount of backpay due, that is, what amount the employee would have received but for the employer's illegal conduct. The General Counsel, in demonstrating gross amounts owed, need not show an exact amount, an approximate amount is sufficient. *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35 (1991).

Thus, it is well established that any formula which approximates what the discriminatee would have earned absent the discrimination is acceptable if it is not unreasonable or arbitrary under the circumstances. *Am-Del-Co., Inc.*, 234 NLRB 1040 (1978); *Frank Mascali Construction*, 289 NLRB 1155 (1988).

Once the gross backpay amounts are established, the burden shifts to the employer to establish facts that would negate or mitigate its liability. *NLRB v. Maestro Plastics*, 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1996). In short, the burden is on the employer to show through a preponderance of credible evidence (*Browning Industries*, 221 NLRB 949, 951 (1975)) that no backpay is owed or that what is alleged to be owed should be diminished because the discriminatee was unavailable for work or neglected to make reasonable efforts to find interim work. *Inland Empire Meat Co.*, 255 NLRB 1306, 1308 (1981), enf. mem. 692 F.2d 764 (9th Cir. 1982). It should be noted, however, that a backpay claimant is not held to the highest standard of diligence in seeking interim employment, but is only required to have made reasonable exertions. Thus, an employer does not satisfy its burden showing that no mitigation took place because the claimant was unsuccessful in obtaining interim employment, by showing an absence of a job application by the claimant during a particular quarter or quarters of a backpay period or by showing the claimant failed to follow certain practices in his job search; e.g., reading and responding to job advertisements in newspapers. *S. E. Nichols of Ohio*, 258 NLRB 1, 11 (1984).

Regarding the issue of mitigation or a discriminatee's duties to reduce his damages as a result of an unlawful discharge, Board law is instructive as well as well settled.

A discriminatee is obliged to mitigate his backpay claim by searching for and/or obtaining interim employment. Therefore while required to search for work, the discriminatee need not be successful but must make an honest, good-faith effort to find work. *Lloyd's Ornamental & Steel Fabricators*, 211 NLRB 217 (1974).

The burden is on the employer to show that the discriminatee did not make reasonable efforts to find work. *Thalbo Corp.*, 323 NLRB 630 (1997); and it does not meet its burden by merely presenting evidence of lack of success in obtaining interim employment or low interim earnings. *Westin Hotel*, 267 NLRB 244 (1983).

Thus, the employer must affirmatively establish by a preponderance that the employee failed to make reasonable efforts to find interim employment. *December 12, Inc.*, 282 NLRB 475 (1986); *Big Three Industrial Gas*, 263 NLRB 1189 (1982).

In order to show good-faith effort and avoid a finding that he incurred willful loss of earnings, the employee need not spend all of every day searching for employment or even search in each and every quarter of the backpay period. *Cornwell Co.*, 171 NLRB 342, 343 (1968). *Laidlaw Corp.*, 207 NLRB 591, 601 (1973), enf. 507 F.2d 1381 (7th Cir. 1974), cert. denied 422 U.S. 1042 (1972). Therefore, the entire backpay period must be looked at to

determine whether throughout the period there was, in light of all the circumstances, a reasonable continuing search such as to foreclose a finding of willful loss. *Cornwell Co.*, above. at 343. As a practical matter, the employee must only make reasonable efforts to mitigate the loss of income and is not required to undertake the highest standard of diligence. *NLRB v. Arduini Mfg. Co.*, 395 F.2d 420 (1st Cir. 1968); *NLRB v. Miami Coca Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966).

As the Board stated in *Lundy Packing Co.*, 286 NLRB 141, 142 (1987):

It is well settled that the reasonableness of a discriminatee's efforts to find a job and thereby mitigate loss of income resulting from an unlawful discharge need not comport with the highest standard of diligence; i.e., he or she need not exhaust all possible job leads. Rather, it is sufficient that the discriminatee make a good-faith effort. In determining the reasonableness of this effort, the discriminatee's skills, experience, qualifications, age, and labor conditions in the area are factors to be considered. The existence of job opportunities by no means compels an inference that the discriminatees would have been hired if they had applied. The respondent's obligation to satisfy its affirmative defense is to show a "clearly unjustifiable refusal to take desirable new employment." Uncertainty in such evidence is resolved against the respondent, as the wrongdoer. [Footnotes omitted.]

In seeking objectively to reconstruct backpay amounts as accurately as possible, the General Counsel may properly adopt elements from the suggested formulas of the parties. *Performance Friction Corp.*, 335 NLRB 117 (2001), citing *Hill Transportation Co.*, 102 NLRB 1015, 1020 (1953).

Arriving at a proper backpay determination is often not an exact science or a precise exercise. In *Alaska Pulp Corp.*, supra, the Board stated that:

Determining what would have happened absent a respondent's unfair labor practices . . . is often problematic and inexact. Several equally valid theories may be available, each one yielding a somewhat different result. Accordingly, the General Counsel is allowed a wide discretion in picking a formula.

It is practically axiomatic in Board law that in the case of unlawful unilateral changes in wages, hours, or other terms or conditions of employment, the Board will order that the status quo ante be restored and that employees be made whole for any benefits the employer unilaterally discontinued. *Beacon Journal Publisher's Co. v. NLRB*, 401 F.2d 366 (6th Cir. 1968); *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999).

On the other hand, if the change involved the granting of a benefit, the Board will order rescission of the beneficial change only if the union seeks such rescission. *Fresno Bee*, 339 NLRB 1214 fn. 6 (2003); *KX TV*, 139 NLRB 93 (1962); *Innovative Communications Corp.*, 333 NLRB 665, 668-669 (2001).

Accordingly, in situations where the changes contain both a detriment and a benefit to the affected employees, a status quo ante restoration order is conditioned upon the affirmative desires of the employees as expressed through their bargaining representative. *Children's Hospital of San Francisco*, 312 NLRB 920, 931 (1993).

Finally, any uncertainties or ambiguities must be resolved against the wrongdoer whose conduct made such doubts possible. *Teamsters Local 469 (Costal Tank Lines)*, 323 NLRB 210 (1997).

5 *B. The Constructive Discharge (Retirement) Principle*⁷²

As a general proposition, a constructive discharge occurs upon a showing that the employer established and implemented burdensome and unpleasant working conditions causing the employees to resign, and these burdens and unpleasantness were imposed on the employees because of their protected activities. *Crystal Princeton Refinery Co.*, 222 NLRB 1068, 1069 (1976).

Accordingly, constructive discharges have been determined where an employer restricted an employee's movements and access, issued warnings, rescinded approvals of leave, and reassigned her in retaliation for her union activities, causing her to quit;⁷³ where an employer threatened to kill an employee, locked him in a garbage truck for 2-3 hours, shot at and hit him with a pellet gun in the context of his having testified at a fellow employee's grievance arbitration hearing, causing the employee to quit;⁷⁴ where an employer's transfer of an employee to a more arduous assignment, reducing her hours, and harassing her because she testified on behalf of the union in a representation hearing and had worn an apron with a "Vote Yes" slogan in support of a union, causing her to quit.⁷⁵

Constructive discharges have not been found where either there was no protected activity or where the conditions and actions of the employer did not rise to the level of unpleasantness or arduousness that would constitute a constructive discharge. The case of *Central Casket Co.* (225 NLRB 362 (1976)) illustrates this point.

In *Central Casket Co.*, an employer caught an employee soliciting fellow employees for the union in violation of a company no-solicitation rule. Subsequently, the employer informed the employee that such behavior could lead to his discharge and warned the employee that he would be watching him due to his improper work habits and failure to keep proper worksheets. After that day, the employee never returned to work, and after a week the employer sent the employee a letter formally discharging him. The judge found the facts sufficient to conclude that the employee was prompted to quit due to his fear of harassment and possible reprisals. Finally, the judge determined that the employee was constructively discharged in order to upset the union's organizational campaign.

However, the Board disagreed with the judge's findings. With respect to the judge's finding that the employee quit due to fear of reprisals and harassment, the Board found no evidence that any employee had ever been subjected to harassment or reprisals for union

⁷² In addition to my own research covering this principle in this section, I have borrowed freely from Region 7's Reply To Charging Union's Request For Review Of General Counsel's Denial Of Its Appeal Of Compliance Determination (R. Exh. 1), which in my view represents a well researched exposition and analysis of the theory of constructive discharge as applied to the retirees here.

⁷³ *Five Cap, Inc.*, 332 NLRB 943 (2000).

⁷⁴ *Pioneer Recycling Corp.*, 323 NLRB 352 (1997). See, also, *La Favorita, Inc.*, 306 NLRB 203 (1992), employee constructively discharged because the employer issued warnings and reduced his hours in retaliation for his testimony favorable to the union at Board proceedings.

⁷⁵ *Marshall Durbin Poultry Co.*, 39 F.3d 1312 (5th Cir. 1994).

activity. The Board also found unconvincing the argument that the employee quit because of the unlawful restriction on soliciting for the union because the employee had given the employer an unrelated reason for not returning to work (illness). The Board reasoned that even if, arguendo, it could accept the argument that the employee quit out of fear of harassment or reprisals, “it does not follow that an employee’s quitting over a threatened restriction on union activity is as a matter of law a constructive discharge.” The Board noted that a threat is not the equivalent of the actual imposition of unlawful conditions of employment; “it [the threat] does not in any meaningful sense render the conditions of employment so intolerable as to compel an employee to leave his job.” Because the Board found that the employer may or may not have acted on his threat to discharge the employee, the Board found the judge’s determination that the employee was constructively discharged premature. *Id.* at 364.

The rationale of *Central Casket* was more recently upheld in *Easter Seals Connecticut, Inc.*, 345 NLRB 836 (2005). In *Easter Seals Connecticut, Inc.*, an employee was given verbal and written warnings for discussing the employer’s hiring decision with another employee. A few days later, the employee resigned, telling her supervisor that it was due to “the ‘aggravation’ she had felt over the past 3 days.” The Board, agreeing with the judge, found that the employee’s decision to resign was not a “Hobson’s Choice” situation because the employee, when explaining to the employer her decision to resign, had not “indicate[d] that her decision was based on her concern that, in order to keep her job, she would be required to forgo her right to engage in protected activity.” Although the Board found that the employer had violated the Act when it gave her the written warning, the Board found that the employee’s reason for quitting was due to hurt feelings over her perception that she was being treated unfairly, not over a “Hobson’s Choice” dilemma. As the Board stated, it would be “inappropriate to hold an employer accountable for having constructively discharged an employee under a ‘Hobson’s Choice’ analysis where the employee’s own testimony establishes that her decision to resign was not, in fact, based on any ‘Hobson’s Choice,’ ‘either/or’ dilemma but rather on some other fact altogether.” The Board also upheld the judge’s reliance on *Central Casket*’s holding that a threat to restrict protected activity does not create conditions of employment “so intolerable as to compel an employee to leave his job.” *Id.* at 842 (quoting *Central Casket*, *supra* at 363.)

In the instant case, while not perfectly on all fours with these authorities, the Respondent’s conduct in the 2004 negotiations—to include its proposal to eliminate the bridge benefit—was in my view more analogous to a “threat” (or possibility) of imposing a change in the employees’ terms and conditions of employment, as opposed to an actual implementation of such a change.

Notably, based on my research, constructive discharge has not been applied by the Board where the employee quit or resigned (retired) from his employment prior to the implementation of an unlawful change in his terms and conditions of employment. As noted by the General Counsel (in R. Exh. 1), it seems that in all relevant cases involving constructive discharge in the context of alleged violations of Section 8(a)(5) stemming from the unlawful imposition of unilateral changes and 8(a)(3) discriminatory discharges resulting from those changes (1) deal with resignations occurring after the unlawful changes were made; (2) constructive discharges were alleged in the underlying complaint as 8(a)(3) violations resulting from the 8(a)(5) violations; and (3) the unilateral changes were of such a nature to present the employees with a Hobson’s Choice of resigning or giving up Section 7 rights.⁷⁶

⁷⁶ In *Schwickert’s of Rochester, Inc.*, 343 NLRB 1044 (2004), where an employee resigned after the employer’s unlawful implementation of unilaterally imposed changes, the Board found a constructive discharge. But see, *Essex International*, 222 NLRB 121 (1976), where 15

Continued

Discussion and Conclusions

It bears repeating that the essential objective in compliance proceedings, as I read the Board authorities, is to restore to the extent feasible the parties to where they were situationally and circumstantially as if there had been no unfair labor practices. Towards that end, we operate between the polarities of two operative principles—the employee is not entitled to more than he may be said to have lost, that is he cannot be unjustly enriched, and the employer cannot or should not receive an advantage from its unlawful conduct. It is within this basic framework that in some reasonable and rational way, the Board determines whether and how an affected employee is to be restored to the status quo ante before the unlawful conduct, in short to be made whole.

As has been stated, the result may not be perfect. In my view, it is like putting Humpty Dumpty together again—even the most successful effort will leave the cracks showing. As to the specification itself, there is no dispute from the Respondent in regards to its rationale and general validity. Indeed, Richard Czubaj, the Board agent who devised the specification, credibly testified about the methodology and general approach he employed in devising the specification. And in my view, the resulting specification which went through several revisions more than adequately sets out a rational and reasonable attempt to make the affected employees whole. I would so find and hold that the specification is valid.

Of course, the Respondent does object, but not to the specification itself but only to those persons who should be excluded in its view from inclusion; the six June retirees and West and Page, consonant and consistent with the Board's Order. So that is the primary issue presented to me.

In summary, the Board's Order determined that the Respondent violated the Act by prematurely declaring an impasse in the bargaining between the parties and implementing its last best offer. The first part of the Board's Ordered remedy requires that the Respondent restore in all respects the terms of the 2001–2004 contract that expired at midnight on June 10, 2004, and to maintain those terms until the parties have bargained to agreement or a valid impasse or the Union agreed to the changes (of the last final offer).

The clear and logical import of the Board's mandate at its core is to place (restore) the parties, the Respondent and the Union, to where they were in terms of their respective contractual duties and responsibilities prior to June 10, 2004; the Board's Order also logically restored the terms and conditions of the unit employees' employment under that contract prior to midnight June 10, 2004. Thus, the Board's Order per force converted the six June retirees as well as West and Page from retirees to employees,⁷⁷ and for purposes of the six retirees, employees contemplating whether to retire because of their perceptions of the ongoing negotiations and the effect thereof on their earned retiree benefits—the bridge money.

employees resigned en masse rather than strike in the context of the union's dissatisfaction with the employer's last best offer, but without informing the employer that their decision was conditional upon settlement of the contract dispute. The Board determined that these individuals were not entitled to reinstatement.

⁷⁷ This is an important but overlooked point because for purposes of the refusal-to-bargain provisions of the Act, the Board has concluded that retirees are not considered to be employees within the meaning of the collective-bargaining obligations of the Act. (See *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971).)

With the foregoing analysis in mind, I would agree with the Respondent and Board Agent Czubaj that as of June 9 or 10, the six retirees were not constructively discharged/retired but, for simplicity, retired. I have reviewed the cases that raise this issue and in my view the constructive retirement theory of inclusion posed by the General Counsel is simply not applicable here with respect to the six retirees.

As noted, the theory essentially requires the Employer to have engaged in such egregious conduct as to make the employee's continued employment intolerable to the point of a forced resignation; and the employee must have engaged in some protected activity.

In my view, the Respondent correctly argues that its conduct during the negotiations can hardly be said to be intolerable or unpleasant as contemplated by the constructive discharge theory. Moreover, in my view it cannot be gainsaid that the six retirees were engaging in any Section 7 type activities as they contemplated retirement during the bargaining period. Basically, each man was measuring the extent of his self-interest; that is, whether to risk losing the bridge money benefit or retire and preserve it.

I would note that the Respondent's conduct at the bargaining session—or the retirees' perception thereof—clearly influenced their decision-making. However, be that as it may, the Respondent's conduct in my view (and apparently the Board's) was not unlawful at the time the retirees made their respective decisions. Accordingly, contrary to the General Counsel, the six retirees in my view were not faced with the Hobson's choice of staying with the Company and enduring its imposition of onerous and intolerable working conditions (arguably elimination of the bridge benefit) or retiring to preserve the already earned bridge benefit.

On balance, then, I would reject the applicability of the theory of constructive discharge (retirement) in this case. I would note also in passing that based on my reading of the applicable case authorities, the constructive discharge theory seems more apposite to the issue of whether there is a substantive violation of the Act, rather than to the compliance proceeding stage that relates to a post-violation remedy. As I see the compliance stage, at its core it invokes the Board's equity as opposed to its legal or substantive legal authority. Notably, to be clear, I do not rest my rejection of the constructive retirement theory on this basis. Rather, as noted, the case authority simply does not support its application in my view to the facts of the instant matter.

However, my findings regarding constructive retirement do not resolve the issue of whether the six retirees should be included in the compliance specification.

The Respondent, as noted, principally contends that they should not be included because they voluntarily retired before the commission of the unfair practices. Accordingly, their retirements cannot be the result of the unfair labor practices as expressed by the Board in its amended order.⁷⁸

⁷⁸ As noted, the Board, in its remand order of April 24, 2009, directed the Regional Director "to address at a hearing, as part of the pending compliance proceeding, and to develop a factual record in the *relationship, if any*, (emphasis supplied) between the Respondent's unfair labor practices and the June retirees' decision to submit their applications for retirement on June 9 and 10, 2009." GC Exh. 1(mm). I will consider the Board's amended order and the remand order as a singular directive to essentially determine whether there is a sufficient connection between the retirees' decision to retire and the unfair labor practice findings.

Consistent with the Board's Order, I have considered the voluntariness issue, an integral matter in my view, from the perspective of the retirees' individual situations prior to midnight on June 10, that is, what their individual mindsets were at that time. As I have set out in this decision, each of the retirees addressed the retirement issue in his testimony.

First, I found each of the retirees eminently credible in their explication of what motivated their respective decisions to retire. Each man directly answered all questions posed by either party and to me they were forthright, sincere, and candid in their answers. Second, if there was a single thread that ran through each man's testimony, it was each man's desire to continue working for the Respondent; to a man, each did not really want to retire at the time. Third, the retirees as a group and individually all said that they enjoyed their jobs, or were "too young" to retire, were healthy and able to work, and only considered retirement because of what they perceived as the Respondent's obduracy with respect to its plan to eliminate the bridge money which they individually candidly admitted was their primary concern for retirement purposes.

It is undisputed that under the contract the earliest an employee could retire was age 55 but at that age one was penalized and forfeited as much as 48 percent of the optimum retirement benefits receivable at age 63. Bean was 55 years old on June 10 and one who enjoyed his job and, as he said, would have gladly returned to work if the Respondent had not implemented the last offer on June 10.

Pomaville, 59 years old on June 10, said he not only did not want to retire but continued after his retirement to perform the same or similar work for Wright K.⁷⁹

Gasta, also 59 years old on June 10 and subject to the 6-percent retirement penalty—about 26 percent in his case—testified that he, too, enjoyed his job and was not ready for retirement and would not have done so were it not for the Company's last and final proposal eliminating the bridge money.

Moore, while 61 years of age, nonetheless, had no retirement plans until June 2004, because he was in his mind healthy, felt good, and enjoyed his job and believed he could return to work before July 1, 2004.

Schmidt, a long time employee but only 59 years old in June 2004, said that he loved his job but only considered retirement to protect his bridge money benefit.

Rinz was only 57 years old in June 2004, but he, too, decided to retire because he heard that the Company was going to eliminate the bridge benefit at the expiration of the current contract, a "hot topic" around the plant at the time along with the rumor the Union was doing poorly in the negotiations. Rinz said that he would not have retired but would have kept working if the contract had been extended, the practical effect of the Board's Order, I should add. Rinz believed he was too young to retire and lamented that at the time his retirement cost him 38 percent of his retirement benefits. However, he believed he had to protect his already earned retirement benefits—the bridge money—which would be eliminated on June 10. Rinz, too, believed that he could return to work before he received his first check on July 1 and at that time if the contract were extended, he could rescind his retirement.

⁷⁹ I would find and conclude that for purposes of the compliance specification, Pomaville clearly made more than reasonable efforts to mitigate any losses attributable to the Respondent's unlawful conduct.

I think that few people would disagree with the notion that an employee's decision to retire from gainful employment should indeed be the product of his own thoughts and personal considerations, and be generally free of extraneous outside influences. Many people retire for many different reasons, all of which may result in a voluntary decision to end their employment. In all candor, a possible change in one's eligibility for pension benefits could in my mind under ordinary circumstances influence one to retire and yet preserve the voluntary nature of the decision. Then, too, one can elect to retire, influenced in part or entirely on a mistaken notion or interpretation of the rules governing the specific retirement plan, and yet the voluntariness of the personal decision can be objectively maintained.

Along these lines, the Respondent contends that the six retirees retired voluntarily because they did not want to take a chance on losing their bridge money benefits as proposed by the Respondent in the course of the negotiations. The Respondent also contends that to the extent the retirees relied on the Union's erroneous interpretation of the pension plan as well as the retirement application form, that was also a function of the decision-making process they employed and was voluntarily undertaken by them in deciding to retire. In short, the Respondent contends that the six June retirees each and all assessed the benefits and costs of the retirement decision and decided to retire to protect their respective financial interests without the active influence of the Company.

At the hearing, I focused on the testimony of each retiree with a view toward gaining an understanding of his state of mind regarding retirement during June 2004 as the old contract was about to expire, and prospects clearly dimming for either an extension or a new agreement that could preserve their already earned retirement benefits. It seems abundantly clear to me that neither of the six was of a mind to retire in June 2004 absent the general perception that the Union was not faring well and that bargaining cuts in benefits were in the immediate offing. As the contract expiration date approached and an extension unlikely, each retiree individually decided to commence the application process. As June 10 neared, each retiree, nevertheless, clung to the hope that the contract would be extended, and some believed—mistakenly in my mind—that the retirement decision could be rescinded.⁸⁰

Additionally, it is clear to me from their respective testimonies that the retirees were individually simply not ready to retire from the jobs they said they enjoyed and were healthy enough to perform. In this regard, I took the opportunity to make a careful observation of the retirees who attended each day of the hearing. Although about 6 years has passed since June 2004, each of the retirees seemed fit and capable of working their same jobs today. Surely when they were 6 years younger, they were more capable of working their jobs and, notably, each man worked a full shift on June 10, 2004.

I would find and conclude based on this record that the six June retirees did not voluntarily retire on June 9 and 10 as the case may be, but each retiree's decision was unduly influenced by the Respondent's obdurate proposal to eliminate their pension benefits, more particularly, the bridge benefits. Thus, I would further find and conclude that the Respondent's unlawful implementation of its last proposal, which included the elimination of the bridge money, had a direct relationship to each retiree's decision to retire. Accordingly, I would recommend

⁸⁰ Parenthetically, while I would agree with the Respondent that the pension plan contained no such rescission rights or anything approaching a "conditional" retirement, nonetheless, this mistaken or misplaced belief again in my view militates against the voluntariness of the decision reached by the retirees who entertained such thoughts.

that each of the six June retirees be included in the class of employees entitled to a backpay award as set out in the specification.

5 Turning to West and Page, in contrast to the six retirees I would recommend that they not be awarded the bridge money retirement benefits as incorporated in the specification.

10 At the hearing there was much discussion about the Newcor pension plan and the process by which pension benefits were determined and authorized for all applicants for retirement. Distilling the testimony from Kostal and Conklin, by virtue of their respective roles and experience with the plan's operation, both men provided credible testimony for purposes of understanding the retirement process and its application to the situation presented by West and Page, and perhaps others similarly situated.

15 In summary, an applicant for retirement fills out and submits an application form indicating his desire to retire. Once this is done, the application is considered by the pension committee, consisting of four members—two representing the employer, Newcor, and two members appointed by the Union.

20 The pension committee is charged with administering the plan and toward that end establishes rules for the administration of the plan and the transaction of its business. More importantly and to the point, the pension committee:

25 [S]hall interpret the plan and shall determine all questions arising in the administration, interpretation, and application of the plan, and all such determinations by the Pension Committee shall be conclusive and binding on all persons. Notwithstanding the above, in the event that the claim of any person to any payment benefit under this Plan shall be denied, the Pension Committee shall as soon as it is practical (i) notify the claimant in writing of the denial in a manner calculated to be understood by the claimant, and setting forth a reasonable procedure whereby the claimant may request a full review of such denial, and (ii) afford a full and fair review of the decision denying the claim, if the claimant requests such a review. [Art. 9, Sec. 9.2.]

35 Additionally, the pension plan sets out certain procedures under which it shall operate. In this regard, Section 9.3 of the plan provides as follows:

40 9.3 Procedures of the Pension Committee. Every decision and action of the Pension Committee shall be valid if concurred in by a majority of the members then in office. To constitute a quorum for the transaction of business there shall be required to be present at least two members of the Pension Committee including at least one Union Member and one Employer Member. At all meetings of the Pension Committee, the Union Members and the Employer Members present shall have equal voting strength. The votes of any absent member(s) shall be divided equally between the members present and appointed by the same party, or if only one member appointed by a party is in attendance, then he shall have voting strength equal to the total number of members appointed by such party. The Pension Committee shall elect a Secretary, who may or may not be a Participant of the Plan or a member of the Pension Committee and any other officers deemed necessary, and adopt rules governing its procedures not inconsistent herewith. The Pension Committee shall keep a permanent record of its meetings and actions. In the event of a voting deadlock, an Impartial Chairman shall be selected by mutual agreement of the Employer Members and the Union Members of the Pension Committee. The Impartial Chairman shall vote only for the purpose of breaking a deadlock. In the event of a deadlock and the inability of the Employer Members and

the Union Members of the Pension Committee to agree upon an Impartial Chairman, the decision as to an arbitrator shall be made promptly in accordance with the rules of the American Arbitration Association or Federal Mediation and Conciliation Services. The fees and expenses of the Impartial Chairman and/or arbitrator shall be paid from the Trust Fund.

Section 9.5 of the pension plan, it should be noted, places certain limitations on the authority of the pension committee, most notably in terms of administering the plan in a nondiscriminatory way. This section provides (in pertinent part) as follows:

9.5 Limitations on Authority of Pension Committee. The Pension Committee shall not take action or direct the Trustee to take any action with respect to any of the benefits provided hereunder or otherwise in pursuance of the powers conferred herein upon the Pension Committee which would be discriminatory in favor of Participants or Employees who are officers, shareholders, or highly-compensated employees or which would result in benefiting one Participant, or group of Participants, at the expense of another, or in the application of different rules to substantially similar sets of facts.

As noted earlier, the Board's Order restored the parties' 2001-2004 contract (and pension plan) from which the foregoing terms were extracted. Accordingly, contrary to the Respondent and in agreement with the General Counsel and the Union, this contract was not rendered nugatory by the closure of the Bay City plant and the termination of the unit employees.

As the Board's Order clearly states, the 2001-2004 agreement remained in effect until certain stated events took place—the partial agreement, valid impasse, etc. A closure of the plant and termination of the employees is not mentioned. In fact, at the time of the hearing the parties were engaged in “effects” bargaining over the consequences of the closure of the plant. So it is clear that the contract remained in force and effect to date, irrespective of the Respondent's view to the contrary, as argued in its brief.

Along these lines, the General Counsel raises in my view a valid point, that is, based on the contract and pension plan, the Respondent was not free to make a unilateral decision to either grant or deny a pension applicant's request for benefits. To that extent, I should note that the Respondent's claim of mistaken retirement authorizations to the three unit employees similarly situated to West and Page is likewise valid. In my view, the mistake should not be repeated in these compliance proceedings, especially where the restored contract specifically deals with problems of this sort.

The Respondent concedes that the pension plan committee did not meet to consider the applications of the three mistaken retirees, nor of course did it meet to consider the applications of West and Page. In my view, this poses a possible violation of the pension plan procedures. However, this possible violation or noncompliance with the plan procedures by the Respondent is not remediable by resort to the instant compliance specification.

As I have noted, employees as a matter of principle are entitled to be made whole but not unjustly enriched as a result of the commission of an unfair labor practice. Here, as I view the matter, Page and West, for purposes of their claim to bridge money benefits, are solely entitled to the benefits of the restored contract and the pension plan, including rights conveyed to them where their claim to benefits is denied, as set out hereinbefore.

It would be my finding and conclusion that an award to West and Page of the bridge money benefit by me, pursuant to the specification, would result in their receiving more than that which they are entitled by way of the make-whole remedy. Accordingly, I would find that the specification to the extent it calls for awarding either West or Page bridge money benefits is invalid, and I would strike those amounts in question from the award amount called for by the specification with respect to West and Page.

I would note in passing that West and Page are not without a remedy since under the contract and pension plan, they have certain "appeal" rights which at least on this record have not been pursued by either man.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸¹

ORDER

The Respondent, Newcor Bay City Division of Newcor, Inc., Bay City, Michigan, its officers, agents, successors and assigns, shall make the following persons whole by paying each the following amounts.⁸²

James R. Aumend	\$8,135.45
Robert Jackson	\$8,281.25
Robert Maida	\$3,074.45
Craig M. Page	\$13,214.57
Jeffrey Ryan	\$11,641.11
Joseph Schwartz	\$1,363.68
Todd Stodolak	\$4,808.56
Robert W. Bean	\$27,555.33
Richard Pomaville	\$43,458.36
Scott B. Dennis	\$7,725.51
Joseph Kanicki	\$2,427.96
John C. Martin	\$1,211.96
Kenneth Reinhardt	\$258.80
George Sawade	\$3,794.11
Thomas Seidel	\$3,988.71
Rodney Thompson	\$24,997.49
James E. Gasta	\$31,348.22
Ronald Rinz	\$14,209.66
Terrance Hartley	\$4,157.52
Gary Letzgus	\$27,576.08
Thomas Martindale	\$5,089.65

⁸¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸² I have found the specification herein to be an eminently rational, fair, and reasonable approximation of the backpay owed to the named persons. However, there may be mathematical errors on my or the compliance officer's part. I would recommend as part of this Order that any purely mathematical error contained herein be self-correcting without further order or action by me.

5	Rodney Ruse	\$13,470.72
	Terry L. Schmidt	\$4,592.76
	Dale Sigmund	\$5,592.67
	John A. Van Hurk	\$4,133.73
	Thomas West	\$96,000.00
10	James F. Moore	\$20,360.84
	Thomas R. Schmidt	\$77,772.67
	John Dahn	\$5,787.60
	Scott Dewyse	\$991.20
	Randall Rezler	\$3,113.64
	Douglas Dewyse	\$2,699.62
	Robert Liss	\$1,520.76
	Michael Ziolkowski	\$2,178.00

15 The Respondent also owes \$54,000 for Sub Fund contributions.

All amounts are exclusive of applicable interest.

So Ordered.

Dated, Washington, D. C. July 21, 2010

Earl E. Shamwell Jr.
Administrative Law Judge